A/63/17

United Nations

Report of the United Nations Commission on International Trade Law

Forty-first session
(16 June-3 July 2008)

General Assembly
Official Records
Sixty-third session
Supplement No. 17

General Assembly
Official Records
Sixty-third session
Supplement No. 17

Report of the United Nations Commission on International Trade Law

Forty-first session
(16 June-3 July 2008)

United Nations • New York, 2008

Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

ISSN 0251-9127

Contents

Chapter		Paragraphs	Page
I.	Introduction	1-2	1
II.	Organization of the session	3-11	1
	A. Opening of the session	3	1
	B. Membership and attendance	4-8	1
	C. Election of officers	9	2
	D. Agenda	10	3
	E. Adoption of the report	11	4
III.	Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea	12-298	4
	A. Introduction	12-14	4
	B. Consideration of draft articles	15-296	5
	C. Report of the drafting group	297	56
	D. Decision of the Commission and recommendation to the General Assembly	298	56
IV.	Procurement: progress report of Working Group I	299-307	57
V.	Arbitration and conciliation: progress report of Working Group II	308-316	59
VI.	Insolvency law	317-321	61
	A. Progress report of Working Group V	317-318	61
	B. Facilitation of cooperation and coordination in cross-border insolvency proceedings	319-321	62
VII.	Security interests: progress report of Working Group VI	322-326	63
VIII.	Possible future work in the area of electronic commerce	327-338	64
IX.	Possible future work in the area of commercial fraud	339-347	67
	A. Work on indicators of commercial fraud	339-344	67
	B. Collaboration with the United Nations Office on Drugs and Crime with respect to commercial and economic fraud	345-347	68
X.	Fiftieth anniversary of the New York Convention	348-352	69
XI.	Monitoring implementation of the New York Convention	353-360	71
XII.	Technical assistance to law reform	361-369	73
	A. Technical cooperation and assistance activities	361-364	73
	B. Technical assistance resources	365-369	74
XIII.	Status and promotion of UNCITRAL legal texts	370-372	75
XIV.	Working methods of UNCITRAL	373-381	76
XV.	Coordination and cooperation	382-384	79

XVI.	Role of UNCITRAL in promoting the rule of law at the national and international levels	385-386	80
XVII.	Willem C. Vis International Commercial Arbitration Moot competition	387	81
XVIII.	Relevant General Assembly resolutions	388-389	81
XIX.	Other business	390-394	82
	A. Internship programme	390	82
	B. Proposed strategic framework for the period 2010-2011	391	82
	C. Evaluation of the role of the Secretariat in facilitating the work of the Commission	392	83
	D. Retirement of the Secretary of the Commission	393-394	83
XX.	Date and place of future meetings	395-398	84
	A. Forty-second session of the Commission	395	84
	B. Sessions of working groups up to the forty-second session of the Commission	396-397	84
	C. Sessions of working groups in 2009 after the forty-second session of the Commission	398	85

Annexes

I.	Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea	86
II.	Letter dated 5 June 2008 from the Minister of Transport of the Netherlands, the Mayor of Rotterdam and the Executive Board of the Port of Rotterdam Authority addressed to the delegates at the forty-first session of the United Nations Commission on International Trade Law	127
III.	List of documents before the Commission at its forty-first session	129

I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the forty-first session of the Commission, held in New York from 16 June to 3 July 2008.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

II. Organization of the session

A. Opening of the session

3. The forty-first session of the Commission was opened on 16 June 2008 by the Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations, Nicolas Michel.

B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the Assembly further increased the membership of the Commission from 36 to 60 States. The current members of the Commission, elected on 17 November 2003 and on 22 May 2007, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated: [1] Algeria (2010), Armenia (2013), Australia (2010), Austria (2010), Bahrain (2013), Belarus (2010), Benin (2013), Bolivia (2013), Bulgaria (2013), Cameroon (2013), Canada (2013), Chile (2013), China (2013), Colombia (2010), Czech Republic (2010), Ecuador (2010), Egypt (2013), El Salvador (2013), Fiji (2010), France (2013), Gabon (2010), Germany (2013), Greece (2013), Guatemala (2010), Honduras (2013), India (2010), Iran (Islamic Republic of) (2010), Israel (2010), Italy (2010), Japan (2013), Kenya (2010), Latvia (2013), Lebanon (2010), Madagascar (2010), Malaysia (2013), Malta (2013), Mexico (2013), Mongolia (2010), Morocco (2013), Namibia (2013), Nigeria (2010), Norway (2013), Pakistan (2010), Paraguay (2010), Poland (2010), Republic of Korea (2013), Russian Federation (2013), Senegal (2013), Serbia (2010), Singapore (2013), South Africa (2013), Spain (2010), Sri Lanka (2013), Switzerland (2010), Thailand (2010), Uganda (2010),

[1] Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 30 were elected by the Assembly at its fifty-eighth session, on 17 November 2003 (decision 58/407), and 30 were elected by the Assembly at its sixty-first session, on 22 May 2007 (decision 61/417). By its resolution 31/99, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session following their election.

United Kingdom of Great Britain and Northern Ireland (2013), United States of America (2010), Venezuela (Bolivarian Republic of) (2010) and Zimbabwe (2010).

5. With the exception of Armenia, Bulgaria, Lebanon, Mongolia, Namibia, Pakistan, Sri Lanka and Zimbabwe, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Angola, Argentina, Belgium, Brazil, Burkina Faso, Chad, Congo, Côte d'Ivoire, Croatia, Cyprus, Democratic Republic of the Congo, Denmark, Ethiopia, Finland, Ghana, Guinea, Holy See, Indonesia, Kuwait, Libyan Arab Jamahiriya, Moldova, Myanmar, Netherlands, New Zealand, Niger, Philippines, Romania, Saudi Arabia, Slovakia, Slovenia, Sweden, the former Yugoslav Republic of Macedonia and Turkey.

7. The session was also attended by observers from the following organizations:

(a) United Nations system: Special Representative of the Secretary-General on human rights, and transnational corporations and other business enterprises and the World Bank;

(b) Intergovernmental organizations: Asian-African Legal Consultative Organization, European Community World Customs Organization (WCO);

(c) Non-governmental organizations invited by the Commission: Advisory Council of the United Nations Convention on Contracts for the International Sale of Goods, American Arbitration Association, American Bar Association, Asociación Americana de Derecho Internacional Privado, Association of American Railroads, Association of the Bar of the City of New York, BIMCO, Center for International Environment Law, Center for International Legal Studies, Comité maritime international (CMI), European Shippers' Council, Federación Latinoamericana de Bancos, Institute of International Banking Law and Practice, Instituto Iberoamericano de Derecho Marítimo, International Association of Ports and Harbors, International Bar Association, International Chamber of Shipping, International Council for Commercial Arbitration, International Federation of Freight Forwarders Associations, International Group of P and I Clubs, International Institute for Sustainable Development, International Multimodal Transport Association, International Swaps and Derivatives Association, Kuala Lumpur Regional Centre for Arbitration, London Court of International Arbitration, Private International Law Interest Group of the American Society of International Law, Union internationale des avocats and World Maritime University.

8. The Commission welcomed the participation of international non-governmental organizations with expertise in the major items on the agenda. Their participation was crucial for the quality of texts formulated by the Commission, and the Commission requested the Secretariat to continue to invite such organizations to its sessions.

C. Election of officers

9. The Commission elected the following officers:

Chairperson: Rafael ILLESCAS ORTIZ (Spain)

Vice-Chairpersons: Amadou Kane DIALLO (Senegal)
Ricardo SANDOVAL LÓPEZ (Chile)
Tomotaka FUJITA (Japan)

Rapporteur: Anita ZIKMANE (Latvia)

D. Agenda

10. The agenda of the session, as adopted by the Commission at its 865th meeting, on 16 June 2008, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea.
5. Procurement: progress report of Working Group I.
6. Arbitration and conciliation: progress report of Working Group II.
7. Insolvency law: progress report of Working Group V.
8. Security interests: progress report of Working Group VI.
9. Possible future work in the area of electronic commerce.
10. Possible future work in the area of commercial fraud.
11. Fiftieth anniversary of the 1958 New York Convention.
12. Monitoring implementation of the 1958 New York Convention.
13. Technical assistance to law reform.
14. Status and promotion of UNCITRAL legal texts.
15. Working methods of UNCITRAL.
16. Coordination and cooperation.
17. Role of UNCITRAL in promoting rule of law at the national and international levels.
18. Willem C. Vis International Commercial Arbitration Moot competition.
19. Relevant General Assembly resolutions.
20. Other business.
21. Date and place of future meetings.
22. Adoption of the report of the Commission.

E. Adoption of the report

11. At its 886th and 887th meetings, on 3 July 2008, the Commission adopted the present report by consensus.

III. Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea

A. Introduction

12. The Commission noted that, at its thirty-fourth session, in 2001, it had established Working Group III (Transport Law) to prepare, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods, such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.[2] At its thirty-fifth session, in 2002, the Commission approved the working assumption that the draft instrument on transport law should cover door-to-door transport operations.[3] At its thirty-sixth to fortieth sessions, in 2003 to 2007, the Commission noted the complexities involved in the preparation of the draft instrument, and authorized the Working Group, on an exceptional basis, to hold its sessions on the basis of two-week sessions.[4] At its thirty-ninth and fortieth sessions, in 2006 and 2007, the Commission commended the Working Group for the progress it had made and agreed that 2008 would be a desirable goal for completion of the project.[5]

13. At the current session, the Commission had before it the reports of the twentieth (Vienna, 15-25 October 2007) and twenty-first (Vienna, 14-25 January 2008) sessions of the Working Group (A/CN.9/642 and A/CN.9/645). The report of the twenty-first session contained in an annex the text of the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea approved by the Working Group. The Commission also had before it a compilation of comments submitted by Governments and intergovernmental organizations regarding the draft Convention as approved by the Working Group (A/CN.9/658 and Add.1-14).

14. The Commission was reminded that, according to the schedule agreed upon at its fortieth session, it was expected to finalize and approve the text of a draft

---

[2] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 345.

[3] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 224.

[4] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 208; ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 64, 132 and 133; ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 183 and 238; ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 200 and subpara. 273 (c); and ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 184.

[5] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 200; and ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 183 and 184.

convention at the current session.[6] The draft convention would then be submitted to the General Assembly for adoption at its sixty-third session, in 2008.

B. Consideration of draft articles

15. The Commission agreed that it should consider the draft articles in the order they appeared in the annex to document A/CN.9/645, except where the interrelationship between certain draft articles required their consideration in a different order. The Commission agreed that the draft definitions should be considered in conjunction with the substantive provisions to which they related.

Chapter 1. General provisions

Draft article 2. Interpretation of this Convention

16. The Commission approved the substance of draft article 2 and referred it to the drafting group.

Draft article 3. Form requirements; and draft article 1, paragraph 17 ("electronic communication")

17. The Commission agreed that the cross references contained in draft article 3 were incomplete and that reference should also be made to draft articles 24, paragraph 4; 69, paragraph 2; and 77, paragraph 4, as those provisions also contemplated communications that needed to be made in writing.

18. The question was asked whether the definition of electronic communication contained in draft article 1, paragraph 17, should include as well the requirement that the communication should also identify its originator. In response to that question, it was observed that the definition of electronic communication used in the draft Convention followed the definition of the same term in the United Nations Convention on the Use of Electronic Communications in International Contracts. The capability of identifying the originator, it was said, was a function of electronic signature methods, which was dealt with in draft article 40, and not a necessary element of the electronic communication itself. The Commission agreed that the draft definition adequately reflected that understanding.

19. Subject to the agreed amendments, the Commission approved the substance of draft article 3 and the definition in draft article 1, paragraph 17, and referred them to the drafting group.

Draft article 4. Applicability of defences and limits of liability

20. The Commission approved the substance of draft article 4 and referred it to the drafting group.

[6] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 184.

Chapter 2. Scope of application

Draft article 5. General scope of application; and draft article 1, paragraphs 1 ("contract of carriage"), 5 ("carrier") and 8 ("shipper")

21. The view was expressed that the notion of "contract of carriage" in the draft convention was wider than under previous conventions, such as the Protocol to amend the International Convention for the unification of certain rules of law relating to bills of lading, 25 August 1924, as amended by the Protocol of 23 February 1968 (the "Hague-Visby Rules") and the United Nations Convention on the Carriage of Goods by Sea (the "Hamburg Rules"), because the Convention would also apply to carriage of goods done only partly by sea. However, it was pointed out that there was no requirement in the draft Convention for the goods actually to be carried by sea, which meant that, in theory, as long as the contract of carriage provided that the goods would be carried by sea, the Convention would apply even if the goods were not actually so carried. As the contract could identify a port of loading and a port of discharge in different States, the Convention would apply, even if the goods had not actually been loaded or discharged at those named ports. Alternatively, if the contract of carriage failed to mention any of the places or ports listed in draft article 5, subparagraphs 1 (a)-(d), it would be possible to infer that the Convention would not apply, even though the goods might, in fact, have been carried by sea in a manner that would have complied with the Convention requirements. The draft Convention, it was proposed, should be amended so as to place the emphasis on the actual carriage rather than on the contractual provisions. One delegation proposed new text for subparagraphs 1 (d) and (e) and a new paragraph 3 to attempt to achieve that. There was some support for that proposal.

22. It was pointed out that from time to time many contracts, for good commercial reasons, left the means of transport open, either entirely or as between a number of possibilities. In that regard, if the contract was not "mode-specific", it might be assumed that the Convention would not apply, except if a requirement for carriage by sea could be implied. Moreover, the requirement that the contract "provide for carriage by sea" might technically exclude contracts that did not specify the mode of transport to be used. It was proposed that additional language should be added to indicate that a contract which permitted carriage by sea should be deemed a "contract of carriage" in cases where the goods were in fact carried by sea.

23. Another proposal was to open the possibility for limiting the scope of the draft Convention only to contracts for carriage by sea so as not to cover contracts for carriage by sea and other modes of transport. The concern was expressed that the draft Convention established special rules applying to one particular type of multimodal transport contract, namely multimodal transport contracts that provided for carriage by sea. That, it was said, would lead to a fragmentation of the laws on multimodal transport contracts. Moreover, the draft convention was said to be generally unsuitable for application to contracts for multimodal transport. It was also said that a comparison between the provisions of the draft and the provisions of other conventions dealing with the carriage of goods, such as the Convention on the Contract for the International Carriage of Goods by Road (1956), as amended by the 1978 Protocol (the "CMR"), the Uniform Rules concerning the Contract for International Carriage of Goods by Rail (Appendix B to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 (the "CIM-COTIF")) and the Convention for the Unification of Certain Rules for

International Carriage by Air (the "Montreal Convention"), revealed not only that the draft Convention was designed almost exclusively with a view to sea carriage but also that it considerably diminished the liability of the carrier, as compared with those other conventions.

24. The Commission took note of those concerns, but was not in favour of amending the provisions that dealt with the scope of application of the Convention. It was observed that the basic assumption of the Working Group had been that the key for determining the scope of application of the draft instrument was the contract of carriage, not the actual carriage of the goods. It was also observed that the Working Group had spent a significant amount of time in considering the scope of the draft Convention and its suitability for contracts of carriage that included other modes of transportation in addition to carriage by sea.

25. The Commission approved the substance of draft article 5 and the definitions contained in draft article 1, paragraphs 1, 5 and 8, and referred them to the drafting group.

Draft article 6. Specific exclusions

26. The Commission approved the substance of draft article 6 and referred it to the drafting group.

Draft article 1, paragraph 3 ("liner transportation")

27. The Commission approved the substance of draft article 1, paragraph 3, on the definition of "liner transportation" and referred it to the drafting group.

Draft article 1, paragraph 4 ("non-liner transportation")

28. The Commission approved the substance of draft article 1, paragraph 4, on the definition of "non-liner transportation" and referred it to the drafting group.

Draft article 7. Application to certain parties

29. The Commission approved the substance of draft article 7 and referred it to the drafting group.

Draft article 1, paragraph 10 ("holder")

30. The Commission approved the substance of draft article 1, paragraph 10, on the definition of "holder" and referred it to the drafting group.

Draft article 1, paragraph 11 ("consignee")

31. The Commission approved the substance of draft article 1, paragraph 11, on the definition of "consignee" and referred it to the drafting group.

Draft article 1, paragraph 2 ("volume contract")

32. As a possible solution to the concerns expressed with respect to the operation of the volume contract provision (see paras. 243 and 244 below), it was suggested that the definition of "volume contract" in draft article 1, paragraph 2, could be adjusted in order to narrow the potential breadth of the volume contract provision.

In particular, the view was expressed that if a specific number of shipments or containers or a specific amount of tonnage of cargo were to be added to the definition, it could provide additional protection, so that parties actually entering into volume contracts would clearly be of equal bargaining power. Some support was expressed for that suggestion.

33. However, the Commission noted that previous attempts by the Working Group to find a workable solution that would provide greater specificity to the definition of "volume contract" had not met with success, and that the Working Group had thus turned its attention to inserting additional protection for parties perceived to be at a disadvantage in the text of draft article 82 itself (see para. 245 below). The Commission agreed that the definition of "volume contract" should be retained as drafted, and that the compromise reached by the Working Group (see A/CN.9/645, paras. 196-204) should therefore be maintained.

34. The Commission approved the substance of draft article 1, paragraph 2, on the definition of "volume contract" and referred it to the drafting group.

Chapter 3. Electronic transport records

Draft article 8. Use and effect of electronic transport records

35. The Commission approved the substance of draft article 8 and referred it to the drafting group.

Draft article 9. Procedures for use of negotiable electronic transport records

36. The Commission approved the substance of draft article 9 and referred it to the drafting group.

Draft article 10. Replacement of negotiable transport document or negotiable electronic transport record

37. The Commission approved the substance of draft article 10 and referred it to the drafting group.

Chapter 4. Obligations of the carrier

Draft article 11. Carriage and delivery of the goods

38. The Commission approved the substance of draft article 11 and referred it to the drafting group.

Draft article 12. Period of responsibility of the carrier

39. Concerns were expressed in the Commission regarding the possible effect of paragraph 3 of draft article 12, which stated that a provision was void to the extent that it provided that the time of receipt of the goods was subsequent to the beginning of their initial loading under the contract of carriage, or that the time of delivery of the goods was prior to the completion of their final unloading under the contract of carriage. In particular, the view was expressed that paragraph 3 could thus be taken to mean that a provision would be valid that provided for an exemption of the carrier from liability for loss or damage that occurred prior to the loading of the goods on the means of transport, or following their having been

unloaded, despite the fact that at such time the carrier or its servants had custody of the goods. In order to avoid that result, the following text was suggested to replace paragraph 3:

> "3. For the purposes of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:
>
> "(a) The time of receipt of the goods is subsequent to the time when the carrier or any person referred to in article 19 has actually received the goods; or
>
> "(b) The time of delivery of the goods is prior to the time when the carrier or any person referred to in article 19 has actually delivered the goods."

40. Some support was expressed for that proposal and for adjusting the text. However, support was also expressed for an alternative interpretation of paragraph 3, such that the carrier should be responsible for the goods for the period set out in the contract of carriage, which could be limited to "tackle-to-tackle" carriage. Those that agreed with the above interpretation of paragraph 3 were generally of the view that the text of the provision should be retained as drafted. However, there was general agreement in the Commission that nothing in the draft Convention prevented the applicable law from containing a mandatory regime that applied in respect of the period prior to the start of the carrier's period of responsibility or following its end.

41. Another interpretation was that paragraph 3 did not modify paragraph 1, but only aimed at preventing the carrier, even if it had concluded an agreement on the basis of draft article 14, paragraph 2, from limiting its period of responsibility to exclude the time after initial loading of the goods or prior to final unloading of the goods. To that end, a suggestion was made that paragraph 3 could be moved to a position in the text immediately following paragraph 1 and that it could also be helpful to replace the opening phrase of paragraph 3 "For the purposes of determining the carrier's period of responsibility" with the words "Subject to paragraph 1". Some support was expressed for that possible approach.

42. There was agreement in the Commission that the different views that had been expressed on the possible interpretation of paragraph 3 illustrated that there could be some ambiguity in the text. However, the Commission was of the view that it might be possible to clarify the text so as to ensure a more uniform interpretation. The Commission agreed that revised text to resolve the apparent ambiguity in paragraph 3 should be considered, and that it would delay its approval of draft article 12 until such efforts had been pursued.

43. Following extensive efforts to clarify the text of paragraph 3 to resolve the apparent ambiguity in the text, the Commission took note that it had not been possible to reconcile the different interpretations of the provisions. In keeping with its earlier decision, the Commission approved the substance of draft article 12 and referred it to the drafting group.

44. An additional view was expressed with respect to the interrelationship between draft article 12 and the right of control. In particular, it was noted that draft article 52, paragraph 2, made it clear that the right of control existed during the

period of responsibility and ceased when that period expired. Concern was expressed that if draft article 12, paragraph 3, operated to allow the parties to agree on a period of responsibility that began after the receipt of the goods for carriage or ended before delivery, there could be a corresponding gap in the right of control between the time of receipt and the start of the period of responsibility and between the end of the period of responsibility and the delivery of the goods. The Commission took note of that concern.

Draft article 13. Transport beyond the scope of the contract of carriage

45. Some concerns were expressed in the Commission with respect to a perceived lack of clarity in draft article 13. In particular, concerns were expressed regarding how a single transport document could be issued when the transport would be undertaken by both the carrier and another person. It was felt by some that the text was in contradiction with the basic principle of the draft Convention in that the carrier could issue a transport document for carriage beyond the contract of carriage but would be responsible for only a portion of the transport. In addition, it was observed that problems could arise with respect to the provision in draft article 43 that the transport document was prima facie evidence of the carrier's receipt of the goods if the transport document could include specified transport that was not covered by the contract of carriage. Given the perceived difficulties of draft article 13, it was proposed that it should be deleted. There was some support in the Commission for that proposal.

46. However, there was also support for the view that draft article 13 reflected an important commercial practice and need, and that it should be maintained in the text as drafted. In particular, it was said that there was a long-standing commercial practice where, as a consequence of the underlying sales agreement in respect of the goods, shippers required a single transport document, despite the fact that a carrier might not be willing or able to complete the entire transport itself. In such cases, it was said to be important that shippers should be able to request that the carrier issue a single transport document, and that carriers should be able to issue such a document even though it included transport beyond the scope of the contract of carriage. However, of greater commercial significance due to their frequency were said to be cases of "merchant haulage", where the consignee of the goods preferred to perform the final leg of the transport to an inland destination. It was observed that strong industry support for such a provision had been expressed during internal consultations undertaken by a number of delegations. In addition, it was observed that draft article 13 was operative only at the request of the shipper, thereby protecting the shipper's interest from any unscrupulous activity by the carrier.

47. Concerns were expressed that the simple deletion of draft article 13 could have a detrimental effect on merchant haulage. If merchant haulage were performed in the absence of draft article 13, it could be found to conflict with draft article 12, paragraph 3. Further, if there were loss of or damage to the goods during the final stage of the transport, it might be expected that such loss or damage should be the responsibility of the consignee. However, as draft article 43 stated that the transport document was conclusive evidence of the carrier's receipt of the goods as stated in the contract particulars, and in contrast to the outcome pursuant to the Hague-Visby Rules, the carrier could unfairly be held responsible for loss or damage occurring during the final leg of the transport that was performed by another party. A possible

remedy for this potential problem was said to be that paragraph 2 of draft article 14 could be adjusted to allow the consignee and the carrier to agree to merchant haulage. However, it was observed that that approach could be problematic owing to other concerns in respect of draft article 14, paragraph 2.

48. A proposal was made that text could be added to draft article 13 to clarify that the portion of the carriage that the carrier was not performing itself should be specified, for example through the use of text such as "for the remaining part of the transport the carrier shall act as forwarding agent on behalf of the shipper". However, it was observed that such an approach had been considered and not adopted by the Working Group, in the interests of avoiding regulation by the draft Convention of agency or forwarding matters.

49. The view was also expressed that the deletion of draft article 13 was unlikely to alter commercial practice in this regard, but that it could cause uncertainty with respect to current practice. In any event, it was observed that if draft article 13 were deleted, care should be taken to ensure that draft article 12, paragraph 3, did not prevent the commercial practice of merchant haulage agreements. While it was observed that the deletion of draft article 13 was unlikely to stop merchant haulage, there was support in the Commission for a clear rule in the draft Convention permitting such a practice.

50. Another proposal was made that draft article 13 could restrict its application to non-negotiable transport documents. However, it was observed that such a restriction would represent a major change in current commercial practice and would thus be more undesirable than deletion of the provision.

51. It was observed that, in the light of the diverging views in the Commission, two options seemed possible. The first was to simply delete draft article 13, but to ensure that the *travaux préparatoires* were clear in indicating that its deletion did not intend to indicate that the long-established commercial practice was no longer allowed. The second option was that the Commission could attempt to redraft draft article 13 in order to retain its purpose but address the concerns that had been raised in regard to its current text. It was further observed that any attempt to redraft the text should make it clear that the provision was operative only at the express request of the shipper, and that it might be possible to redraft the text in order to clarify the carrier's obligation in respect of the shipper in such cases.

52. The Commission agreed that revised text for draft article 13 should be considered and that it would delay its final consideration of draft article 13 until such efforts had been pursued.

53. Following extensive efforts to clarify the text of draft article 13 to resolve the concerns that had been raised with respect to it, the Commission took note that it had not been possible to agree on a revised text for the provision. In keeping with its earlier decision, the Commission agreed that draft article 13 should be deleted, taking note that that deletion did not in any way signal that the draft Convention intended to criticize or condemn the use of such types of contract of carriage.

Draft article 14. Specific obligations

54. Concerns were expressed in the Commission with respect to the title of the draft provision. It was observed that the term "specific obligations" did not seem

appropriate, particularly as translated into some of the language versions, as the provision itself set out very standard obligations of the carrier. It was suggested that the title of the provision should be "general obligations" or possibly "obligations in respect of the goods". While the view was also expressed that the existing title of the provision was appropriate, there was some support for changing the title along the lines suggested.

55. A proposal was made to include in paragraph 1 the requirement that the carrier carefully receive and mark the goods. However, it was observed that marking the goods was generally felt to be the shipper's obligation, and the proposal was not taken up.

56. Support was expressed for a proposal to delete paragraph 2 of draft article 14, which regulated FIOS (free in and out, stowed) clauses. Concern was expressed that paragraph 2 required the consignee to perform certain obligations without requiring that it consent to such performance. Concern was also expressed that a traditional responsibility of the carrier was now being left to freedom of contract. However, it was observed that the intention of the provision was not to establish obligations for the consignee, but rather to allow for common commercial situations in which the carrier and the shipper agreed that the shipper would perform obligations usually required of the carrier, and for which the carrier should therefore not be held responsible should loss or damage result. For example, it was noted that shippers often preferred to load and stow the goods themselves for a variety of commercial reasons, including superior technical knowledge, or the possession of special equipment. It was stated that paragraph 2 was a positive step in terms of settling the law in the area of FIOS clauses, which was quite unclear.

57. A suggestion was made that paragraph 2 could be limited to non-liner transportation as, in liner trade, the carrier typically performed the listed obligations itself in respect of the containers. It was noted that draft article 83, subparagraph (b), could cover those cases where the shipper itself undertook the handling of the goods in liner transportation. However, it was observed that in some situations, as for example with respect to irregular or non-containerized goods such as large machinery, special equipment or particular products, FIOS clauses were employed in the liner trade as well. Accordingly, the suggestion was not taken up.

58. At the conclusion of its consideration of the draft provision, the Commission approved the substance of draft article 14 and referred it to the drafting group.

Draft article 15. Specific obligations applicable to the voyage by sea

59. The view was expressed that the draft article represented a significant increase in the carrier's liability, as it made the obligation to provide a seaworthy ship a continuing one rather than limiting it to the time before and at the beginning of the voyage by sea. The Commission took note of that view and of the countervailing view, for which there was some support, that the draft article still set the carrier's liability at a low standard, as it contemplated only an obligation to exercise due diligence to make the ship seaworthy, rather than a firm obligation to provide a seaworthy ship. In that connection, there was not sufficient support for a proposal to qualify the carrier's due diligence obligations to provide a seaworthy ship by including a reference to "prevailing standards of maritime safety".

60. It was noted that, as currently worded, draft article 15 seemed to suggest that a container might be regarded as an intrinsic part of the ship, which in most situations was not the case. In order to avoid misunderstanding, it was proposed to replace the words "including any containers" with the words "and any containers" in subparagraph (c) of the draft article, and to make the necessary grammatical adjustments in the provision. The Commission accepted that proposal.

61. In connection with the same provision, it was pointed out that, at its twenty-first session, the Working Group had agreed to add references to "road or railroad cargo vehicle" in those provisions that mentioned containers, pallets and similar articles used to consolidate goods, where such addition was required by the context. Those additional words, it was suggested, should also be added to subparagraph (c) of draft article 15. However, the Commission did not accept that proposal, which was considered to be of little practical relevance in the context of the provision in question, as it was regarded as highly unlikely that a carrier would also supply a "road or railroad cargo vehicle" for the purpose of the voyage by sea.

62. The Commission approved the substance of draft article 15 and referred it to the drafting group.

Draft article 16. Goods that may become a danger

63. A proposal was made to limit the carrier's rights under draft article 16 by providing that the carrier could take any of the measures contemplated in the draft article only if it was not aware of the dangerous nature of the goods. The carrier, it was further suggested, should also be required to explain the reasons for taking any of those measures and to show that the actual or potential danger posed by the goods could not have been averted by less drastic measures than the ones actually taken.

64. There was not sufficient support for those proposals. On the one hand, it was felt that requiring the carrier to justify the reasons for any measures taken under the draft article was unnecessary, as the carrier would be required to do so in court in case the measures were challenged by the cargo interests. On the other hand, it was pointed out that draft articles 16 and 17 were important to confirm the carrier's authority to take whatever measures were reasonable, or even necessary, under the circumstances to prevent danger to persons, property or the environment. The carrier did not enjoy unlimited and uncontrolled discretion under draft article 16, which merely made it clear that measures reasonably taken by the carrier to avoid danger posed by the goods did not constitute a breach of the carrier's obligations to care for the goods received for carriage. However, the carrier's release of liability under draft article 18, subparagraph 3 (o), was not an absolute one as, in any event, the measures taken by the carrier under draft articles 16 and 17 were subject to the standard of reasonableness stated in those provisions and otherwise inherent to the carrier's duty of care for the cargo under the draft Convention. It was also said that limiting the carrier's rights under the draft article to situations where the carrier could prove that it was not aware of the dangerous nature of the goods would be tantamount to shifting the risk of carrying dangerous goods from the shipper to the carrier, a result which should not be condoned in the draft Convention.

65. The Commission approved the substance of draft article 16 and referred it to the drafting group.

Draft article 17. Sacrifice of the goods during the voyage by sea

66. The Commission approved the substance of draft article 17 and referred it to the drafting group.

Chapter 5. Liability of the carrier for loss, damage or delay

Draft article 18. Basis of liability

Paragraph 2

67. The Commission heard expressions of strong support for amendments to paragraph 2 of draft article 18, in addition to a request to delete paragraph 3.

Paragraph 3

68. The Commission heard strong expressions of support for the deletion of paragraph 3 and the entire list of circumstances under which the carrier was relieved of liability for loss of or damage to the goods. It was stated that such a system was reminiscent of early stages of liner transportation and was not justified at a time when the shipping industry had made tremendous technological strides, with the appearance of new generations of vessels, container ships and ships specializing in the carriage of hazardous or highly perishable goods. The Hamburg Rules, it was noted, did not retain the list of excepted perils of the Hague-Visby Rules, which meant that for all States that had adopted the Hamburg Rules the draft Convention represented a step backwards. Paragraph 3 of draft article 18, it was said, was likely to adversely affect the legal situation of the party entitled to the cargo and might result, as a normal practical consequence, in higher insurance premiums, which would obviously be reflected in the price of the goods. That snowball effect would ultimately reach the final consumers, with all the obvious implications for their purchasing power and hence for national economies.

69. While giving sympathetic consideration to those arguments, the Commission broadly agreed that the paragraph should not be deleted. The Commission was reminded of the extensive debate that had taken place in the Working Group on the same matter and of the various views that had been expressed. The Commission was aware of the depth of those discussions and of the careful compromise that had been achieved with the current text of draft article 18. That compromise, the Commission felt, would be jeopardized by the proposed deletion of paragraph 3 of the draft article, a provision which in the view of many delegations was an essential piece of an equitable liability regime.

70. Furthermore, it was generally felt that the objections raised to the draft paragraph resulted from a misunderstanding of its practical significance. The liability of carriers was generally based on fault, not on strict liability. The principle that the carrier would be liable for damage to goods if the damage was proved to be the result of the carrier's fault was not, therefore, any novelty introduced by the draft Convention. Paragraph 3 was part of a general system of fault liability and the circumstances listed therein were typically situations where a carrier would not be at fault. Even more importantly, the list in paragraph 3 was not a list of instances of absolute exoneration of liability, but merely a list of circumstances that would reverse the burden of proof and would create a rebuttable presumption that the damage was not caused by the carrier's fault. The shipper still retained the

possibility, under paragraphs 4 and 5 of the draft article, to prove that the fault of the carrier caused or contributed to the circumstances invoked by the carrier, or that the damage was or was probably the result of the unseaworthiness of the ship. Even many of those who had originally opposed the list in paragraph 3 in the Working Group were now, as a whole, satisfied of the adequacy of the liability system set forth in draft article 18.

Paragraphs 4, 5 and 6

71. Another criticism that was voiced in respect of draft article 18 concerned the burden of proof, which was said to depart from previous regimes. While it was not questioned that the party having the onus of proof must produce the evidence to support its claim, it was said that it would be more difficult for shippers to discharge their burden of proof under the draft article than under existing law. It was observed that evidence about the causes of a loss of cargo was often difficult to obtain, particularly for the consignee or shipper as they would not have access to all (or any) of the relevant facts. The burden of proof with respect to the actual causes of the loss should normally rest with the carrier, which was in a better position than the shipper to know what happened while the goods were in the carrier's custody. If there was more than one cause of loss or damage, the carrier should have the onus of proving to what extent a proportion of the loss was due to a particular cause.

72. It was argued that the shipper would have difficulty proving unseaworthiness, improper crewing, equipping or supplying, or that the holds were not fit for the purpose of carrying goods, as required by paragraph 5. The combined effect of paragraphs 4, 5 and 6 was to change the general rule on allocation of liability in a manner that was likely to affect a significant number of cargo claims and disadvantage shippers in cases where there was more than one cause of the loss or damage and a contributing cause was the negligently caused unseaworthiness of the vessel. In such cases, the shipper would bear the onus of proving to what extent unseaworthiness contributed to the loss. It was said that whenever loss or damage had resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under the draft article, which should be amended accordingly. Furthermore, it was proposed that paragraph 6 should be deleted, as it was feared that the concept of proportionate liability introduced therein might create evidentiary hurdles for claimants in litigation.

73. The Commission took note of those concerns. However, there was ample support for retaining paragraphs 4, 5 and 6 of the draft article as they currently appeared. The burden placed on the shipper, it was noted, was not as great as had been stated. In fact, nothing in the draft article required the shipper to submit conclusive proof of unseaworthiness, as the burden of proof would fall back on the carrier as soon as the shipper had showed that the damage was "probably" caused by or contributed to by unseaworthiness. Paragraph 6, too, had been the subject of extensive debate within the Working Group and the current text reflected a compromise that many delegations regarded as an essential piece of the overall balance of draft article 18.

Conclusions concerning the draft article

74. The Commission reverted to a general debate on draft article 18, in particular its paragraph 3, after it had reviewed paragraphs 4-6.

75. The Commission heard strong objections to the decision not to amend the draft article, in particular its paragraph 3 (see paras. 68-70 above). The maintenance of that paragraph, it was stated, would have a number of negative consequences, such as higher insurance premiums, resulting in higher prices of goods and consequently reduced quality of life for the final consumers, which would particularly be felt by the populations of least developed countries, landlocked developing countries and small island developing States. That outcome, it was further stated, would be contrary to a number of fundamental policy goals and principles of the United Nations, as formally adopted by the General Assembly. The Commission was reminded, for instance, of the Millennium Development Goals expressed in General Assembly resolution 60/1 of 16 September 2005, which adopted the 2005 World Summit Outcome. Those goals called for the right to development to be made a reality for everyone. All organs and agencies of the United Nations, it was pointed out, were requested to work towards the linkage between their activities and the Millennium Development Goals in accordance with Assembly resolution 60/1. The Commission was urged not to ignore its role in that process and to bear in mind the negative impact that its decision regarding draft article 18 would have for a number of developing and least developed countries. The concern was expressed that by retaining in the text provisions that unduly favoured carriers to the detriment of shippers, the Commission might diminish the acceptability of the draft Convention in entire regions of the world.

76. The Commission paused to consider those concerns, including suggestions for attempting to redraft the draft article in a manner that might accommodate some of them. The prevailing and strongly held view, however, was that over the years of extensive negotiations the Working Group had eventually achieved a workable balance between the interests of shippers and carriers and that the draft article represented the best compromise that could be arrived at. It was considered that it would be highly unlikely that a better result could be achieved at such a late stage of the negotiations. Moreover, the draft article was part of an overall balance of interests, and any changes in its substance would necessitate adjustments in other parts of the draft Convention, some of which were themselves the subject of delicate and carefully negotiated compromises.

77. While reiterating its sympathy for those who were not entirely satisfied with the draft article, the Commission decided to approve the substance of draft article 18 and to refer it to the drafting group. In doing so, the Commission requested the drafting group to align the reference to containers in subparagraph 5 (a)(iii) with a similar reference in draft article 15, subparagraph (c), deleting the brackets around the relevant phrase.

Draft article 19. Liability of the carrier for other persons

78. The Commission approved the substance of draft article 19 and referred it to the drafting group.

Draft article 20. Liability of maritime performing parties; and draft article 1, paragraphs 6 ("performing party") and 7 ("maritime performing party")

79. It was noted that draft article 20 made the maritime performing party subject to the same liabilities imposed on the carrier. According to the definition in draft article 1, paragraph 7, an inland carrier would be regarded as a maritime performing party only if it performed or undertook to perform its services exclusively within a port area. The combined effect of those provisions was said to be inappropriate, as seaworthy packing could also be performed inland. Furthermore, cargo companies located in seaports were more and more frequently performing services that did not fall under the obligations of the carrier. Furthermore, there might be doubts as to whether a road or rail carrier that brought goods into the port area would qualify as a maritime performing party for its entire journey or whether it would be a mere performing party until it reached the port area and would become a maritime performing party upon entering the port area. As it was in practice difficult to establish the boundaries of port areas, the practical application of those provisions would be problematic. In view of those problems, it was suggested that the draft Convention should allow for declarations whereby Contracting States could limit the scope of the Convention to carriage by sea only.

80. In response, it was noted that in accordance with draft article 1, paragraph 7, an inland carrier would be regarded as a maritime performing party only if it performed or undertook to perform its services exclusively within a port area. That qualification was consistent with a policy decision taken by the Working Group that road carriers should generally not be equated with maritime performing parties. Therefore, a road carrier that brought goods from outside the port area into the port area would not be regarded as a maritime performing party, as the road carrier had not performed its obligations exclusively in the port area. Furthermore, it was noted that it had become common for local authorities to define the extent of their port areas, which would in most cases provide a clear basis for the application of the draft article. The Working Group, it was further noted, did not consider that there was any practical need for providing a uniform definition of "port area".

81. The Commission approved the substance of draft article 20 and of the definitions contained in draft article 1, paragraphs 6 and 7, and referred them to the drafting group.

Draft article 21. Joint and several liability

82. The Commission approved the substance of draft article 21 and referred it to the drafting group.

Draft article 22. Delay

83. The view was expressed that the draft article was unsatisfactory, as it did not limit the amount recoverable for delay in delivery, leaving the issue entirely to freedom of contract. Another criticism was that it was unclear whether under the draft article damage caused by the delay would also be recoverable in case of implied delivery deadlines or periods. It was proposed, therefore, that the draft article should be deleted and that the matter of liability for delay should be left for applicable national law.

84. In response, it was noted that, as currently worded, the draft article did not require an express agreement on a delivery time or period, neither did it allow the carrier to exclude its liability for delay.

85. The Commission approved the substance of draft article 22 and referred it to the drafting group.

Draft article 23. Calculation of compensation

86. There was no support for a proposal to mention a determination of value of the goods by the competent courts in cases where there were no similar goods. It was felt that courts generally would assess the compensation according to the local rules and that the draft Convention should not venture into offering concrete rules for exceptional situations.

87. The Commission approved the substance of draft article 23 and referred it to the drafting group.

Draft article 24. Notice in case of loss, damage or delay

88. The Commission approved the substance of draft article 24 and referred it to the drafting group.

Chapter 6. Additional provisions relating to particular stages of carriage

Draft article 25. Deviation

89. The Commission approved the substance of draft article 25 and referred it to the drafting group.

Draft article 26. Deck cargo on ships; and draft article 1, paragraphs 24 ("goods"), 25 ("ship") and 26 ("container")

90. There was not sufficient support for a proposal to supplement the definition of the word "goods" with a reference to road and railroad cargo vehicles, as it was considered that the proposed addition would require amendments in other provisions of the draft Convention, such as draft article 61, paragraph 2, that mentioned goods, containers or road and railroad cargo vehicles.

91. The Commission approved the substance of draft article 26 and of the definitions contained in draft article 1, paragraphs 24, 25 and 26, and referred them to the drafting group. The Commission requested the drafting group to ensure consistency throughout the draft Convention in references to "customs, usages and practices of the trade".

Draft article 27. Carriage preceding or subsequent to sea carriage

92. It was recalled by the Commission that, in addition to referring to other international instruments, previous versions of draft article 27 of the draft Convention had also contained a bracketed reference to "national law". It was further recalled that at the nineteenth and twentieth sessions of the Working Group, that reference had been deleted as part of a compromise proposal concerning several issues, including the level of the limitation of the carrier's liability (see A/CN.9/621, paras. 189-192 and A/CN.9/642, paras. 163 and 166).

93. A proposal was made in the Commission to reinstate the reference to "national law" in draft article 27, or to include a provision in the draft Convention allowing a Contracting State to make a declaration including its mandatory national law in draft article 27. In support of that proposal, it was observed that some States had very specific national rules to deal with particular geographical areas, such as deserts, and would like to preserve those special rules once the draft Convention came into force. Further, it was suggested that as the current text of draft article 27 provided a solution in the case of possible conflicts with regional unimodal transport conventions, other States that were not parties to such conventions should have their national law accorded the same status, even though their national rules did not arise as a result of international obligations. In addition, it was suggested that re-establishing a reference to "national law" in draft article 27 could allow more States to ratify the Convention and thus allow for broader acceptance of the instrument by as many States as possible.

94. Concern was also expressed in the Commission with respect to the fact that draft article 27 applied only to loss or damage of goods that could be identified as having occurred during a particular leg of the carriage. It was suggested that in most cases it would be quite difficult to prove where the loss or damage had occurred and that draft article 27 was likely to have limited operability as a result. It was further suggested that in those cases in which it was possible to localize the loss or damage, it would be particularly important to give way to national law governing that particular leg of the carriage.

95. While some support and sympathy were expressed for the reinsertion of a reference to "national law" in draft article 27, reference was made to the fact that the current text of draft article 27, including the deletion of the reference to "national law", had arisen as a result of a complex compromise that had taken shape over the course of several sessions of the Working Group. Caution was expressed that that compromise had involved a number of different and difficult issues, including the establishment of the level of limitation of the carrier's liability, and that reinserting the reference to national law could cause that compromise to unravel. The Commission was called upon to support the existing text that had been the outcome of that compromise, and there was support for that view. A number of delegations noted that they had not been completely satisfied with the outcome of the compromise, but that they continued to support it in the interests of reaching as broad a consensus on the text as possible.

96. In further support of the text as drafted, it was observed that the inclusion of "national law" in draft article 27 was quite different from including international legal instruments. In the case of international instruments, the substance of the legislation could be expected to be quite well known, transparent and harmonized, thus not posing too great an obstacle to international trade. In contrast, national law differed dramatically from State to State, it would be much more difficult to discover the legal requirements in a particular domestic regime, and national law was much more likely to change at any time. It was suggested that those factors made the inclusion of national law in draft article 27 much more problematic and would likely result in substantially less harmonization than including international instruments in the provision. There was support in the Commission for that view.

97. It was suggested that, as draft article 27 was clearly no longer a provision governing conflict of conventions, the use of the phrase "do not prevail" in its

chapeau might be misconstrued. In its place, it was suggested that the phrase "do not apply" might be preferable. However, it was observed that simply replacing the phrase as suggested could be problematic, as the conflicting provisions would not simply be inapplicable, but would be inapplicable only to the extent that they were in conflict with the provisions of the draft Convention. Further, it was recognized that a more substantial redraft of the text of draft article 27 would probably be necessary in order to achieve the suggested result. The Commission agreed that the current text of draft article 27 was acceptable.

98. After consideration, the Commission approved the substance of draft article 27 and referred it to the drafting group.

Chapter 7. Obligations of the shipper to the carrier

Draft article 28. Delivery for carriage

99. The Commission approved the substance of draft article 28 and referred it to the drafting group.

Draft article 29. Cooperation of the shipper and the carrier in providing information and instructions

100. The Commission approved the substance of draft article 29 and referred it to the drafting group.

Draft article 30. Shipper's obligation to provide information, instructions and documents

101. The Commission approved the substance of draft article 30 and referred it to the drafting group.

Draft article 31. Basis of shipper's liability to the carrier

102. The Commission approved the substance of draft article 31 and referred it to the drafting group.

Draft article 32. Information for compilation of contract particulars; and draft article 1, paragraph 23 ("contract particulars")

103. It was observed in the Commission that draft articles 32 and 33 provided for potentially unlimited liability on the part of the shipper for not fulfilling its obligations in respect of the provision of information for the contract particulars or in respect of shipping dangerous goods. Concern was expressed that the potentially unlimited liability of the shipper was in contrast with the position of the carrier, which faced only limited liability as a result of the operation of draft article 61. Given other contractual freedoms permitted pursuant to the draft Convention, it was suggested that some relief in this regard could be granted to the shipper by deleting the reference to "limits" in draft article 81, paragraph 2, thereby allowing the parties to the contract of carriage to agree to limit the shipper's liability. (See the discussion of the proposed deletion of "limits" in respect of draft art. 81, para. 2, in paras. 236-241 below.) The Commission agreed that it would consider that proposal in conjunction with its review of draft article 81 of the text.

104. The Commission approved the substance of draft article 32 and of the definition contained in draft article 1, paragraph 23, and referred them to the drafting group.

Draft article 33. Special rules on dangerous goods

105. The Commission approved the substance of draft article 33 and referred it to the drafting group.

Draft article 34. Assumption of shipper's rights and obligations by the documentary shipper; and draft article 1, paragraph 9 ("documentary shipper")

106. A concern was expressed that draft article 34 was too broad in subjecting the documentary shipper to all of the obligations of the shipper. That view was not taken up by the Commission. In response to a question whether the documentary shipper and the shipper could be found to be jointly and severally liable, the view was expressed that there was not intended to be joint and several liability as between the two.

107. The Commission approved the substance of draft article 34 and of the definition contained in draft article 1, paragraph 9, and referred them to the drafting group.

Draft article 35. Liability of the shipper for other persons

108. The Commission approved the substance of draft article 35 and referred it to the drafting group.

Draft article 36. Cessation of shipper's liability

109. Questions were raised in the Commission regarding the rationale for the inclusion of draft article 36 in the text, particularly in the light of the generally permissive approach of the draft Convention to freedom of contract. While it was recalled that certain delegations in the Working Group had requested the inclusion of a provision on the cessation of the shipper's liability, the Commission was of the general view that the provision was not necessary in the text and could be deleted.

110. The Commission agreed to delete article 36 from the text of the draft Convention.

Chapter 8. Transport documents and electronic transport records

Draft article 37. Issuance of the transport document or the electronic transport record

111. The Commission approved the substance of draft article 37 and referred it to the drafting group.

Draft article 38. Contract particulars

112. There was strong support for the view that, in its present formulation, the draft article was incomplete in that it related only to the goods and the carrier, but did not mention, in particular, other essential aspects, such as delivery and means of transport. It was observed that the shipper or the consignee, as the case might be,

would require additional information to enable it to take action in respect of the shipment. Banks often required shippers to present "shipped" bills of lading, which required the shipper to name the vessel on which the goods were loaded. By the same token, a consignee that expected goods at a certain destination should not be surprised by requests to take delivery of the goods at a different place, and the draft Convention should require the transport document to state information that the consignee could rely upon. The consignee should further be able, on the basis of the information contained in the transport document, to take the steps necessary for an orderly delivery of the goods, such as hiring inland transportation, and would thus need to know at least the place of destination and the expected time of arrival. It was therefore proposed that the following information should be required to be stated in the transport document, in addition to those elements already mentioned in the draft article: the name and address of the consignee; the name of the ship; the ports of loading and unloading; and the date on which the carrier or a performing party received the goods, or the approximate date of delivery.

113. Another proposal for adding new elements to the list in the draft article argued for the inclusion of the places of receipt and delivery, as those elements were necessary in order to determine the geographic scope of application of the Convention in accordance with its article 5. In the absence of those elements, the parties might not know whether the Convention applied to the contract of carriage.

114. In response to those proposals, it was pointed out that the draft article was concerned only with mandatory contract particulars without which the transport could not be carried out and which were needed for the operation of other provisions in the draft Convention. Nothing prevented the parties from agreeing to include other particulars that were seen as commercially desirable to be mentioned in the transport document. It was further noted, however, that the proposed addition contemplated some factual information, such as the name of the vessel, the port of loading or unloading or the approximate date of delivery, which, at the moment of issuance of the transport documents, the parties might not yet know. One of the primary interests of the shipper, it was said, would usually be to obtain a transport document as soon as possible, so as to be able to tender the transport document to the bank that issued the documentary credit in order to obtain payment in respect of the goods sold. However, the issuance of the transport document would unnecessarily be delayed if all the additional information proposed for inclusion in the draft article were to be made mandatory. It was explained that in the case of multimodal transport, for instance, several days might elapse between the departure of the goods from an inland location and their actual arrival at the initial port of loading. Some more time would again pass before the goods were then carried by another vessel to a hub port, where they would be again unloaded for carriage to a final destination. In such a situation, which was quite common in practice, usually only the name of the first vessel or of the feeder vessel was known at the time when the transport document was issued. In addition to that, the ports of loading and unloading were often not known, as large carriers might allocate cargo among various alternative ports on the basis of financial considerations (such as terminal charges) or operational considerations (such as availability of space on seagoing vessels).

115. It was argued that the mention of the name of the shipper should not be made mandatory either. It was true, it was said, that transport documents always stated a

named person as shipper. In practice, however, the named person was often only a documentary shipper and carriers often received requests for changing the named shipper. In some cases, a shipper might even, for entirely legitimate commercial reasons, prefer to keep its name confidential. That practice never prevented the carriage of the goods, as carriers typically knew their clients and would know whom to charge for the freight. Similar reasons, it was further stated, gave cause for caution in requiring the transport document to mention other elements, such as the name and address of the consignee, as in many cases goods might be sold in transit and the name of the ultimate buyer would not be known at the time when the transport document was issued. The usual practice in many trades was simply to name the consignee as "to the order of the shipper". Negotiating chains in some trades meant also that even the place of delivery might be not known at the time the goods were loaded. Shippers in the bulk oil trade originating in the Far East, for example, often described the destination of the cargo in unspecific terms (such as "West of Gibraltar"), a usage that in practice seldom caused problems but would be precluded by the proposed extension of the mandatory contract particulars.

116. Indication of the date of delivery was said to be equally unsuitable for becoming a mandatory element of the transport document, as in most cases a sea carrier might be in a position to give only an inexact estimate of the duration of the voyage. Uncertainty about the date of delivery was solved, and delivery to the consignee facilitated, by the current practice of advising the carrier about the notify party. The draft Convention further improved that practice by requiring the transport document to state the name and address of the carrier, a requirement not included in the Hamburg Rules, for example. The progress in information and communication technology, which was illustrated by the advanced cargo tracking system that many carriers had offered via the Internet in recent years, made it much easier for cargo interests to obtain details about the delivery of goods directly from the carrier, than it was in the time when consignees needed to rely essentially on the transport document itself for that information.

117. The Commission engaged in an extensive debate concerning the desirability of adding new elements to those already mentioned in draft article 38 and what the practical consequences of such addition would be. In response to a question, it was noted that the qualification of the elements listed in draft article 38 as "mandatory" contract particulars was to some extent misleading, as draft article 41 made it clear that the absence or inaccuracy of one or more of those contract particulars did not affect the legal nature and validity of the transport document. Accordingly, the consignee, for example, would not be deprived of its rights to claim delivery under a transport document if draft article 38 had not been entirely or accurately complied with owing to an error or omission of the shipper or the carrier. Similarly, the draft Convention did not affect any right that the shipper might have, under the applicable law, to obtain certain information that the carrier failed to insert in the transport document, or to rely on a certain factual assumption in the absence of information to the contrary. That did not mean, however, that it would be reasonable to expand the list endlessly, as further requirements would necessarily increase the burden on the parties.

118. The Commission was sensitive to the arguments advanced in favour of keeping the list of requirements in draft article 38 within the limits of commercial reasonableness. Nevertheless, there was wide agreement that some additional

requirements might be appropriate in order to place the shipper and the consignee in a better position to meet the demands of banks issuing documentary credit or to make the logistical and other arrangements necessary for collecting the goods at destination. It was pointed out that in view of the relationship between draft articles 38 and 41, an expanded list would not negatively affect trade usage, as the transport document could still be validly issued even without some information not yet available before the beginning of the carriage. The Commission also recognized that some elements might necessitate some qualification as regards, for instance, their availability at the time of issuance of the transport document.

119. A proposal was made to insert into the text of draft article 38 the following paragraph:

> "2 bis. The contract particulars in the transport document or the electronic transport record referred to in article 37 shall furthermore include:
>
> "(a) The name and address of the consignee, if named by the shipper;
>
> "(b) The name of a ship, if specified in the contract of carriage;
>
> "(c) The place of receipt and, if known to the carrier, the place of delivery; and
>
> "(d) The port of loading and the port of discharge, if specified in the contract of carriage."

120. It was noted that although most of the suggestions for inclusion in draft article 38 had been accommodated, it had not been possible to include reference to the expected date of delivery of the goods. Although efforts had been made to include that information, it was felt that such information was so closely related to draft article 22 and the liability of the carrier for delay in delivery of the goods, that it was best not to risk upsetting the approved content of those provisions. There was broad support in the Commission for the inclusion of the new paragraph 2 bis in draft article 38.

121. The Commission approved the substance of draft article 38, with the addition of paragraph 2 bis, and referred it to the drafting group.

Draft article 39. Identity of the carrier

122. The Commission took note of a statement to the effect that the policy adopted in the draft article was unsatisfactory.

123. The Commission approved the substance of draft article 39 and referred it to the drafting group.

Draft article 40. Signature

124. There was support for understanding that the draft article did not specify the requirements for the validity of a signature, be it a handwritten or an electronic one, which was a matter left for the applicable law.

125. The Commission approved the substance of draft article 40 and referred it to the drafting group.

Draft article 41. Deficiencies in the contract particulars

126. Subject to terminological adjustments that might be needed in some language versions, the Commission approved the substance of draft article 41 and referred it to the drafting group.

Draft article 42. Qualifying the information relating to the goods in the contract particulars

127. It was pointed out that, in practice, goods might be delivered for carriage in a closed road or railroad cargo vehicle, such as to limit the carrier's ability to verify information relating to the goods. The Commission agreed that the references to "container" in the draft article should be expanded in order to cover those vehicles as well. The Commission requested the drafting group to consider alternatives for making reference to those vehicles in a manner that avoided burdening the draft article with unnecessary repetitions and bearing in mind the use of similar references elsewhere in the text.

128. The Commission approved the substance of draft article 42 and referred it to the drafting group.

Draft article 43. Evidentiary effect of the contract particulars

129. There was not sufficient support for a proposal to replace the words "but not" with the word "and" in subparagraph (c)(ii) of draft article 43. It was noted that, unlike the identifying numbers of containers, the identifying numbers of container seals might not be known to the carrier, as seals might be placed by parties other than the shipper or the carrier, such as customs or sanitary authorities.

130. The Commission agreed that in the situation contemplated by subparagraph (c)(ii) of the draft article, it would not be appropriate to extend the provision in question to road or railroad cargo vehicles.

131. The Commission approved the substance of draft article 43 and referred it to the drafting group.

Draft article 44. "Freight prepaid"

132. The Commission approved the substance of draft article 44 and referred it to the drafting group.

Draft article 1, paragraph 14 "transport document"

133. It was observed that the Working Group had agreed at its final session to delete reference to the "consignor" in the draft Convention and that, as a consequence, the definition of "transport document" had been adjusted to make subparagraphs (a) and (b) conjunctive rather than disjunctive. As mere receipts were thus excluded from the definition of a "transport document", it was proposed that the phrase "or a performing party" could be deleted from the chapeau of the definition. The Commission approved that correction.

134. An additional proposal was made that the phrase "or a person acting on its behalf" should be inserted where the previous phrase had been deleted, in order to bring the definition in line with the phrase in draft article 40, paragraph 1, on

signature. However, it was noted that in the preparation of the draft Convention, care had been taken to avoid reference to matters of agency, which, while common relationships in commercial transport, were thought to be too complex to be brought within the scope of the Convention. Further, it was observed that while there was perceived to be a need to reference acting on behalf of the carrier with respect to signature, it was thought that inserting the phrase in the definition of "transport document" would raise questions regarding its absence elsewhere in the draft Convention. The Commission supported that view, and decided against including the additional phrase.

135. It was also suggested that the following text should be inserted as a paragraph into the definition: "Evidences when goods are acquired by/delivered to the consignee". However, it was observed that draft article 11 set out the obligation of the carrier to carry the goods to the place of destination and deliver them to the consignee, and the proposal was not taken up by the Commission.

Draft article 1, paragraphs 15 ("negotiable transport document"), 16 ("non-negotiable transport document"), 18 ("electronic transport record"), 19 ("negotiable electronic transport record"), 20 ("non-negotiable electronic transport record"), 21 ("issuance" of a negotiable electronic transport record), 22 ("transfer" of a negotiable electronic transport record) and 27 ("freight")

136. After making the same correction to draft article 1, paragraph 18, as had been made to draft article 1, paragraph 14, by twice deleting the phrase "or a performing party" where it appeared in the chapeau of draft article 1, paragraph 18, the Commission approved the substance of the definitions contained in draft article 1, paragraphs 15, 16, 18, 19, 20, 21, 22 and 27, and referred them to the drafting group.

Chapter 9. Delivery of the goods

General comment

137. A concern was expressed with respect to chapter 9 as a whole. In general, the aim of the legal regime in chapter 9 to provide legal solutions to a number of thorny questions was applauded. However, it was thought that certain difficult questions remained, such as: when did the consignee have an obligation to accept delivery; what was the carrier's remedy if the consignee was in breach of that obligation; and what steps were necessary on the part of the carrier to ensure that the goods were delivered to the proper person.

138. It was suggested that the chapter created more problems than it solved and that adoption of the chapter could negatively affect ratification of the Convention. The Commission took note of those concerns.

Draft article 45. Obligation to accept delivery

139. Concerns in line with the general comment expressed in respect of chapter 9 were also raised with respect to draft article 45. While there was some support for that approach, the focus of concern in respect of the draft provision was the phrase "the consignee that exercises its rights". It was suggested that that phrase was too vague in terms of setting an appropriate trigger for the assumption of obligations under the Convention. It was suggested that that uncertainty could be remedied by

deleting the phrase at issue and substituting for it: "the consignee that demands delivery of the goods". There was support in the Commission for that view.

140. In response to that position, it was observed that draft article 45 had been included in the draft Convention to deal with the specific problem of consignees that were aware that their goods had arrived but wished to avoid delivery of those goods by simply refusing to claim them. It was noted that carriers were regularly faced with that problem and that draft article 45 was intended as a legislative response to it. It was further explained that the phrase "exercises its rights" was intended to cover situations such as when the consignee wished to examine the goods or to take samples of them prior to taking delivery, or when the consignee became involved in the carriage. It was observed that the United Nations Convention on Contracts for the International Sale of Goods (the "United Nations Sales Convention") required that buyers that wanted to reject the goods under the contract of sale take delivery of them from the carrier, but that the buyer would do so on behalf of the seller. It was suggested that draft article 45 was appropriate and in keeping with that approach. There was some support in the Commission for that view.

141. After discussion, the Commission decided to adopt the amendment suggested in paragraph 139 above. With that amendment, the Commission approved the substance of draft article 45 and referred it to the drafting group.

Draft article 46. Obligation to acknowledge receipt

142. The Commission approved the substance of draft article 46 and referred it to the drafting group.

Draft article 47. Delivery when no negotiable transport document or negotiable electronic transport record is issued

143. A concern was expressed that draft article 47 protected the carrier only when it had followed the required procedure set out in the provision, but that the carrier was not protected when it had not followed that procedure. Further, the issue was raised that if the shipper was no longer the controlling party, it was probably because it had already transferred all of its rights in the goods to the controlling party, including the right to instruct on delivery. The Commission took note of those concerns.

144. The Commission approved the substance of draft article 47 and referred it to the drafting group. (For subsequent discussion and the conclusions on this draft article, see paras. 166-168 below.)

Draft article 48. Delivery when a non-negotiable transport document that requires surrender is issued

145. The Commission approved the substance of draft article 48 and referred it to the drafting group. (For subsequent discussion and the conclusions on this draft article, see paras. 166-168 below.)

Draft article 49. Delivery when a negotiable transport document or negotiable electronic transport record is issued

146. It was generally acknowledged that the problems faced by carriers when cargo owners appeared at the place of destination without the requisite documentation, or failed to appear at all, represented real and practical problems for carriers. However, concerns were expressed in the Commission regarding whether the text of draft article 49 was the most appropriate way to solve those problems. In particular, the view was expressed that draft article 49 undermined the function of a negotiable transport document as a document of title by allowing carriers to seek alternative delivery instructions from the shipper or the documentary shipper and thus removing the requirement to deliver on the presentation of a bill of lading. Further concern was expressed that subparagraph (d) would increase the risk of fraud and have a negative impact on banks and others that relied on the security offered by negotiable transport documents. One delegation emphasized that discussions with banks had indicated that draft article 49 would result in banks having additional risks to manage.

147. It was also suggested that the indemnity in subparagraph (f) could be problematic for cargo insurers, for example, in a CIF (cost, insurance and freight) shipment, where insurance was arranged by the seller and the policy was assigned to the buyer when the risk of shipment transferred. It was suggested that if the seller unwittingly provided an indemnity to the carrier by providing alternative delivery instructions, this could have an impact on any recovery action that an insurer might have had against the carrier. That, it was said, would result in the loss of one avenue of redress for cargo claimants seeking recovery for misdelivery. A further complication was said to be that the combined effect of subparagraphs (d)-(f) was that a carrier that obtained alternate delivery instructions from a shipper would be relieved of liability to the holder, but that if the shipper had given an indemnity to the carrier, the shipper would have indemnified a party that had no liability.

148. As a response to some of the criticism expressed, various examples were given of how the new system envisioned under draft article 49 would reduce the current widespread possibility of fraud. For example, current practices subject to fraud were said to involve the issuance of multiple originals of the bill of lading, forgery of bills of lading and the continued circulation and sale of bills of lading even following delivery. The regime established by draft article 49 was aimed at reducing or eliminating many of those abuses. Further, it was emphasized that that regime set up a system aimed at removing risk for bankers by restoring the integrity of the bill of lading system, and that discussions with banks and commodities traders had indicated that, while they might be forced to adjust some of their practices, they considered the new regime to present less risk for them. In addition, it was noted that the current system of obtaining letters of indemnity, possibly coupled with bank guarantees, was both a costly and a slow procedure for consignees.

149. It was noted that the serious problems which draft article 49 was attempting to solve were the problems not just of carriers but of the maritime transportation industry as a whole. It was further observed that the industry had grappled with the problems for some time without success, and that a legislative solution was the only viable option. While it was recognized that the approach taken in draft article 49 might not be optimal in every respect, broadly acceptable adjustments to the approach might still be possible. The Commission was urged to take the opportunity

to adopt a provision such as draft article 49, in order to provide a legislative solution to restore the integrity of the function of negotiable transport documents in the draft Convention.

150. Some support was expressed for the concerns regarding the problems with respect to the anticipated operation of draft article 49 outlined in paragraphs 146 and 147 above, but views differed on how best to address those problems. While some delegations favoured deletion of the provision as a whole, others favoured only the deletion of subparagraphs (d)-(f) or of subparagraphs (e) and (f), while still others were in favour of considering possible clarification of those problematic subparagraphs. Some delegations supported the text of draft article 49 as drafted, without any amendment. However, there was widespread acknowledgement that the problems addressed by draft article 49 were real and pressing.

151. The Commission agreed to consider any improved text that might be presented.

152. The Commission resumed its deliberations on the draft article after it had completed its review of the draft Convention. In the meantime, extensive consultations had been informally conducted with the participation of a large number of delegations with a view to formulating alternative language for the draft article that addressed the various concerns expressed earlier (see paras. 146 and 147 above). The Commission was informed of the difficulty that had been faced in attempting to find a compromise solution in the light of the extent of disagreement concerning the draft article, as many had expressed the wish to delete subparagraphs (d)-(h), while many others had insisted on retaining the draft article in its entirety. Nevertheless, as a result of those informal consultations, the following new version of the draft article was submitted for consideration by the Commission:

> "1. When a negotiable transport document or a negotiable electronic transport record has been issued:
>
> "(a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 45 to the holder:
>
> "(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a)(i), upon the holder properly identifying itself; or
>
> "(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;
>
> "(b) The carrier shall refuse delivery if the conditions of subparagraph (a)(i) or (a)(ii) are not met;
>
> "(c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity. When a negotiable electronic transport record has been used,

such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, paragraph 1.

"2. If the negotiable transport document or the negotiable electronic transport record states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rule applies:

"(a) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (a)(i), or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

"(b) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph (2) (a) of this article is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

"(c) The person giving instructions under subparagraph 2 (a) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph (2) (e) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

"(d) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph (2) (b) of this article, but pursuant to contractual or other arrangements made before such delivery, acquires rights against the carrier under the contract of carriage other than the right to claim delivery of the goods;

"(e) Notwithstanding subparagraphs (2) (b) and (2) (d) of this article, a holder that becomes a holder after such delivery, and that did not have and could not reasonably have had knowledge of such delivery at the time it became a holder, acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods."

153. It was explained that besides a few minor corrections to the original text, such as inserting in subparagraph 1 (a)(i) the proper cross reference to draft article 1, subparagraph 10 (a)(i), the proposed new text contained a number of substantive changes to the original text. The wording of subparagraph 2 (a), it was pointed out, was different from subparagraph 2 (d) of the original text in essentially two respects. First, while the original text obliged the carrier to advise that the goods had not been claimed and imposed on the controlling party or the shipper the obligation to give instructions in respect of the delivery of the goods, the new text allowed the carrier to seek instructions but imposed no obligation on the shipper to provide them. That change was proposed in order to address the concern that the shipper might not always be able to give appropriate instructions to the carrier under those circumstances. Secondly, it was explained that the previous text required notice to be given to the holder, and in the absence of notice – be it because the holder could not be found or because the location of the holder was not known to the carrier – the remainder of the provision did not apply. In contrast, the proposed new provisions would still apply in such situations, which were found to be typical and to warrant a solution in the draft article.

154. In addition to those changes, it was further explained, the proposed new text differed from the original text in another important aspect. Paragraph 2 of the proposed text now subjected the rules on delivery of goods set forth in its subparagraphs (a) and (b) to the existence, in the negotiable transport document or negotiable electronic transport record, of a statement to the effect that the goods could be delivered without the surrender of the transport document or the electronic transport record. This addition, it was pointed out, represented the most contentious point in the entire proposed new draft article. The original text, it was explained, had received strong criticism based on concern about the negative impact that rules allowing delivery of goods without the surrender of negotiable transport documents might have on common trade and banking practices, as well as from the viewpoint of the legal doctrine of documents of title. The proposed revised text was intended to address such concern by requiring a clear warning for all parties potentially affected, in the form of an appropriate statement in the negotiable transport document, that the carrier was authorized to deliver the goods even without the surrender of the transport document, provided that the carrier followed the procedures set forth in the draft article. The proposed rules, it was pointed out, were meant to operate in the form of a contractual "opt-in" system: in order for the carrier to be discharged of its obligation to deliver by delivering the goods under instructions received from the shipper even without the surrender of the negotiable transport document, the parties must have agreed to allow the carrier to deliver the goods in such a fashion under the circumstances described in the draft article. It was observed that, if the Commission agreed to replace draft article 49 with the proposed new text, consequential changes would be needed in draft articles 47, 48 and 50.

155. In commenting on the proposed new text for draft article 49, a number of the concerns that had been raised in regard to the original text of draft article 49 were reiterated, as were a number of the views expressed by those who supported the original text of the provision. There was some support for the view that the new text of draft article 49 did not solve the problems previously identified.

156. By way of specific comment on the proposed new text, some delegations that had expressed strong objections to the original text of the draft provision and had requested its deletion repeated that preference in respect of the proposed new text. At the same time, some delegations that had strongly supported the original text of draft article 49 reiterated that support, but expressed the view that the proposed new text could be an acceptable alternative.

157. Although views concerning the original text of the provision remained sharply divided, there was general support in the Commission for the proposed new text of draft article 49 as representing a compromise approach that could achieve broader acceptance. Supporters of the original text of draft article 49 expressed the view that while the provisions of paragraph 2 of the revised text were no longer mandatory, as they had been in the original version, they were nonetheless an improvement over the current state of affairs.

158. In addition, while there was general support for the "opt-in" approach taken in the revised text as being less troubling for those with lingering concerns regarding the content of paragraph 2, some preference was still expressed for an "opt-out" or "default" approach to be taken in paragraph 2 of the new text. In that regard, it was thought that the "opt-out" approach would be less likely simply to preserve the status quo. Further, concern was expressed that in some jurisdictions a transport document containing a statement that the goods may be delivered without surrender of the transport document would not be considered a negotiable document at all. However, there was support for the view that the difference between an "opt-in" and an "opt-out" approach was probably not of great significance, as the three major parties involved in the commodities trade to which paragraph 2 would be most relevant (i.e. carriers, commodity traders and banks) would dictate whether or not paragraph 2 was actually used. It was observed that that decision would be made for commercial reasons, and would not likely rest on whether the provision was an "opt-in" or an "opt-out" one. It was generally thought that, regardless of the particular approach, the proposed new text of draft article 49 would provide the parties involved in the commodities trade, which was said to be highly subject to abuse in terms of delivery without presentation of the negotiable document or record, with the means to eliminate abuses of the bill of lading and its attendant problems.

159. In further support of the revised text, it was observed that the current situation was not satisfactory, as the treatment of bills of lading that included a statement that there could be delivery without their surrender varied depending on the jurisdiction. In some jurisdictions, only the statement was held to be invalid but, in others, it was held to be valid and carriers could simply deliver without surrender without following any particular rules at all. Further, there was a danger that such statements could appear in bills of lading, as at least one major carrier had previously introduced, and then withdrawn, such a statement in its documents. In the face of such uncertainty, the revised text of draft article 49 was an improvement and could be seen as a type of guarantee that some sort of procedure would be followed, even when goods were allowed to be delivered without surrender of the negotiable document or record.

160. There were some suggestions for adjustments to the proposed new text of draft article 49. It was suggested that as the provision would be most relevant in the commodities trade, which primarily incorporated into the transport document by

reference the terms and conditions in the charterparty, the phrase "indicates either expressly or through incorporation by reference to the charterparty" should be included in the chapeau of paragraph 2 rather than the word "states". There was some support for that suggestion.

161. However, objections were also voiced to allowing the delivery of goods without surrender of transport documents by mere incorporation by reference to the terms of a charterparty. There was support for the suggestion that if the possibility contemplated in paragraph 2 were to be widened any further, it would be preferable to delete the paragraph altogether. An alternative proposal was made that the word "expressly" should be included before the word "states". There was support for that approach, particularly among those who had supported deletion of all or part of the original text of draft article 49.

162. A question was raised whether it might be desirable to adjust the title of draft article 49 to reflect the fact that the negotiable transport document or electronic transport record might, in some cases, not require surrender. In response, it was said that it would be preferable to keep the title as drafted, as the general rule under draft article 49 would still require surrender of the negotiable document or record, and that paragraph 2 was meant to be an exception to that general rule. There was support for that view.

163. In response to a question whether the "contractual arrangement" referred to in paragraph 2 (d) could be a verbal agreement, it was noted that the term referred to a sales contract or a letter of credit, which would typically be in writing, but that since draft article 49 was not included in the draft article 3 list of provisions with a writing requirement, it was possible that it could be a verbal agreement.

164. A concern was raised with respect to whether the interrelationship between the new paragraph 2 and draft article 50 was sufficiently clear. In order to remedy that concern, the Commission agreed to insert the phrase "without prejudice to article 50, paragraph 1" at the start of paragraph 2.

165. Subject to the insertion of the words "without prejudice to article 50, paragraph 1" in the beginning of paragraph 2 and of the word "expressly" before the word "states" in that same sentence, the Commission approved the substance of the new draft article 49 and referred it to the drafting group.

Consequential changes to draft article 47 (Delivery when no negotiable transport document or negotiable electronic transport record is issued); draft article 48 (Delivery when a non-negotiable transport document that requires surrender is issued); and draft article 50 (Goods remaining undelivered)

166. Having decided to replace draft article 49 with the new text (see paras. 152 and 165 above), the Commission agreed that consequential changes needed to be made to draft articles 47 and 48 in order to align them with the new text. The following revised texts were proposed for the relevant provisions:

Article 47. Delivery when no negotiable transport document or negotiable electronic transport record is issued

"(c) Without prejudice to article 50, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival,

does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;"

Article 48. Delivery when a non-negotiable transport document that requires surrender is issued

"(b) Without prejudice to article 50, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, (ii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, or (iii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;".

167. It was further noted that the words "the holder" should be inserted after the words "the controlling party" in draft article 50, subparagraph 1 (b).

168. The Commission approved the proposed revisions to draft articles 47, 48 and 50 and referred them to the drafting group.

Draft article 50. Goods remaining undelivered

169. The view was expressed that the remedies set out in draft article 50 were only available to a carrier facing undelivered goods after it had attempted to deliver the goods in keeping with the procedure set out in draft article 49. However, there was support in the Commission for the alternative view that the use of the disjunctive "or" in listing the various bases on which goods would be deemed to have remained undelivered clearly indicated that an entitlement or an obligation to refuse delivery under draft article 49 constituted only one of several reasons for which goods could be deemed to have remained undelivered. A proposal was made to make that latter intention clear through the addition of a phrase along the lines of "without regard to the provisions of articles 47, 48 or 49" after the phrase "the carrier may exercise the rights under paragraph 2 of this article" in paragraph 3, but such an addition was not found to be necessary.

170. It was noted that in some jurisdictions, the applicable law required local authorities to destroy the goods rather than allowing the carrier itself to destroy

them. In order to accommodate those jurisdictions, a proposal was made to insert into subparagraph 2 (b) a requirement along the lines of that for the sale of goods pursuant to subparagraph 2 (c) that the destruction of the goods be carried out in accordance with the law or regulations of the place where the goods were located at the time. There was support for that proposal and for the principle that the carrier should abide by the local laws and regulations, provided that those requirements were not so broadly interpreted as to unduly restrict the carrier's ability to destroy the goods when that was necessary.

171. Some drafting suggestions were made to improve the provision. It was observed that depending on the outcome of the discussions relating to draft article 49, a consequential change might be required to add the word "holder" to subparagraph 1 (b). It was also suggested that the logic of draft article 50 might be improved by deleting subparagraph 1 (b) as being repetitious of other subparagraphs or that the order of subparagraphs (b) and (c) of paragraph 2 should be changed, since destruction was the more drastic remedy of the two. The Commission took note of those suggestions.

172. With the addition of a requirement in draft article 50, subparagraph 2 (b), along the lines of that of draft article 52, subparagraph 2 (c), that the destruction of the goods by the carrier be carried out in accordance with the law or regulations of the place where the goods were located at the time, the Commission approved the substance of draft article 50 and referred it to the drafting group. (For consequential changes to this draft article, see also paras. 166-168 above.)

Draft article 51. Retention of goods

173. The Commission approved the substance of draft article 51 and referred it to the drafting group.

Draft article 1, paragraph 9 ("documentary shipper")

174. The Commission approved the substance of draft article 1, paragraph 9, containing the definition of "documentary shipper" and referred it to the drafting group.

Chapter 10. Rights of the controlling party

Draft article 52. Exercise and extent of right of control

175. A question was raised regarding how a controlling party could exercise its right of control with respect to the matters set out in paragraph 1 when such details were not set out in the contract of carriage. Several examples were given in response, such as the situation where the controlling party was a seller who discovered that the buyer was bankrupt and the seller wanted to deliver the goods to another buyer, or the simple situation where a seller requested a change of temperature of the container on the ship. It was emphasized that there were safeguards written into the draft Convention to protect against potential abuses.

176. The Commission approved the substance of draft article 52 and referred it to the drafting group.

Draft article 53. Identity of the controlling party and transfer of the right of control

177. A correction was proposed to the text of draft article 53, paragraph 1. It was observed that when paragraph 2 of draft article 53 had been inserted in a previous version of the draft Convention, the consequential changes that ought to have been made to paragraph 1 had been overlooked. To remedy that situation, it was proposed that the chapeau of paragraph 1 be deleted and replaced with the words: "Except in the cases referred to in paragraphs 2, 3 and 4 of this article." Further, it was observed that the reference in subparagraph 3 (c) should be corrected to read "article 1, subparagraph 10 (a)(i)" rather than "article 1, subparagraph 11 (a)(i)." The Commission agreed with those corrections.

178. Subject to the agreed corrections to paragraph 1, the Commission approved the substance of draft article 53 and referred it to the drafting group.

Draft article 54. Carrier's execution of instructions

179. The Commission approved the substance of draft article 54 and referred it to the drafting group.

Draft article 55. Deemed delivery

180. The Commission approved the substance of draft article 55 and referred it to the drafting group.

Draft article 56. Variations to the contract of carriage

181. The Commission approved the substance of draft article 56 and referred it to the drafting group.

Draft article 57. Providing additional information, instructions or documents to carrier

182. The Commission approved the substance of draft article 57 and referred it to the drafting group.

Draft article 58. Variation by agreement

183. After deciding that it was not necessary to add a reference to draft article 53, paragraph 2, to draft article 58, the Commission approved the substance of draft article 58 and referred it to the drafting group.

Draft article 1, paragraphs 12 ("right of control") and 13 ("controlling party")

184. The Commission approved the substance of draft article 1, paragraph 12, containing the definition of "right of control" and paragraph 13, containing the definition of "controlling party" and referred them to the drafting group.

Chapter 11. Transfer of rights

185. There was some support for the view that, as a whole, the draft chapter was not sufficiently developed to achieve either certainty or harmonization of national law. It was also suggested that the draft chapter contained vague language and that

further clarification and modification to the draft chapter was required if it was to be of benefit to future shippers, consignees and carriers.

186. It was suggested that draft articles 59 and 60 should be revised in such a way that the transfer of liabilities under the contract of carriage would coincide with the transfer of the rights under the underlying contract. That, however, was said to be a complex area of the law, which was ultimately better suited to being treated in a separate instrument. If the draft Convention were to venture into such a delicate area, it would also need to address other complex issues regarding the transfer of liabilities, such as whether a third-party holder of the document was bound and under which circumstances a transferor was relieved of its obligations. Those considerations, it was said, called for the deletion of the entire chapter or at least for allowing Contracting States to "opt out" of the draft chapter.

187. The Commission took note of those views but was generally favourable to retaining the draft chapter.

Draft article 59. When a negotiable transport document or negotiable electronic transport record is issued

188. The view was expressed that the draft article was not sufficiently elaborated as it did not deal, for instance, with the transfer of rights under straight bills of lading. That omission, it was said, illustrated the general inadequacy of the entire chapter.

189. The Commission took note of that view, but agreed to approve the draft article and to refer it to the drafting group.

Draft article 60. Liability of holder

190. Concerns were expressed that under paragraph 2 of the draft article a holder might face the risk that even a trivial exercise of a right under the contract of carriage might trigger an assumption of liability. In practice, negotiable transport documents might be consigned to a bank without prior notice or agreement. The effect of article 60, paragraph 2, would therefore be to increase the risks on banks or other holders. That was said to be a matter of particular concern for banks in some jurisdictions, where serious reservations had been expressed to paragraph 2 of the draft article.

191. The Commission took note of those concerns, but was generally in favour of maintaining paragraph 2 as currently worded.

192. In connection with paragraph 3, the question was asked whether the position of the holder under draft article 60 was similar to the position of the consignee under draft article 45. If that was the case, and in view of the Commission's decision in respect of draft article 45 (see para. 141 above), it was suggested that the two provisions might need to be aligned, for instance by replacing the phrase "does not exercise any right under the contract of carriage" with the phrase "does not demand delivery of the goods".

193. In response, it was noted that the ambit of the two provisions was different, and that paragraph 3 of the draft article was in fact broader than draft article 45. Draft article 45 was concerned with the consignee, which typically exercised rights by demanding delivery of the goods. Draft article 60, however, was concerned with the holder of the transport document, that is, the controlling party under draft

article 53, paragraphs 2 to 4. Limiting the operation of paragraph 3 to cases where the holder had not claimed delivery of the goods would be tantamount to releasing a holder that exercised the right of control from any liability or obligation under the draft Convention. Given the extent of rights given to the controlling party by draft article 52, that result would not be acceptable. The only change that had become necessary in view of the Commission's decision in respect of draft article 45 was to delete the cross reference in paragraph 3.

194. Having considered the different views on the draft article, the Commission agreed to approve it and to refer it to the drafting group, with the request to delete the reference to draft article 45 in paragraph 3.

Chapter 12. Limits of liability

Draft article 61. Limits of liability

195. The Commission was reminded of the prolonged debate that had taken place in the Working Group concerning the monetary limits for the carrier's liability under the draft Convention. The Commission was reminded, in particular, that the liability limits set forth in the draft article were the result of extensive negotiations concluded at the twenty-first session of the Working Group with the support of a large number of delegations and were part of a larger compromise package that included various other aspects of the draft Convention in addition to the draft article (see A/CN.9/645, para. 197). Not all delegations that had participated in the deliberations of the Working Group were entirely satisfied with those limitation levels and the large number of supporters of the final compromise included both delegations that had pleaded for higher limits and delegations that had argued for limits lower than those finally arrived at.

196. The Commission heard expressions of concern that the proposed levels for the limitation of the carrier's liability were too high and that there was no commercial need for such high limits, which were said to be unreasonable and unrealistic. There was some support for those concerns, in particular given that a number of delegations felt that the level of limitation of the Hague-Visby Rules was adequate for commercial purposes. It was said that it would have been possible for some delegations to make an effort to persuade their industry and authorities of the desirability of accepting liability limits as high as those set forth in the Hamburg Rules, as an indication of their willingness to achieve consensus. It was also said, however, that the levels now provided for in the draft article were so high as to be unacceptable and they might become an impediment for ratification of the Convention by some countries, which included large trading economies.

197. The Commission took note of those concerns. There was sympathy for the difficulties that existed in some countries to persuade industry and authorities to accept liability limits higher than they might have anticipated. Nevertheless, there was wide and strong support in the Commission for maintaining those limits so as not to endanger the difficult compromise that had been reached, which a large number of delegations were committed to preserving. It was noted that in some countries it had been difficult to gain support for the draft Convention, because domestic stakeholders had felt that the liability limits were lower than their expectations. It was hoped that those who now expressed objections to the liability limits in the draft article might likewise be able to join the consensus in the future.

In the context of the draft article, however, the Commission was urged not to attempt to renegotiate the liability limits, even though they had not met the expectations of all delegations.

198. The Commission heard a proposal, which received some support, for attempting to broaden the consensus around the draft article by narrowing down the nature of claims to which the liability limits would apply in exchange for flexibility in respect of some matters on which differences of opinion had remained, including the applicability of the draft Convention to carriage other than sea carriage and the liability limits. The scope of the draft article, it was proposed, should be limited to "loss resulting from loss or damage to the goods, as well as loss resulting from misdelivery of the goods". It was said that such an amendment would help improve the balance between shipper and carrier interests, in view of the fact that the liability of the shipper was unlimited.

199. The Commission did not agree to the proposed amendment to paragraph 1, which was said to touch upon an essential element of the compromise negotiated at the Working Group. The Commission noted and confirmed the wide and strong support for not altering the elements of that general compromise, as well as the expressions of hope that ways be found to broaden even further its basis of support.

200. The Commission approved the substance of draft article 61 and referred it to the drafting group.

Draft article 62. Limits of liability for loss caused by delay

201. In response to a question, it was pointed out that the liability limit set forth in the draft article applied only to economic or consequential loss resulting from delay and not physical loss of or damage to goods, which was subject to the limit set forth in draft article 61.

202. The Commission approved the substance of draft article 62 and referred it to the drafting group.

Draft article 63. Loss of the benefit of limitation of liability

203. The Commission approved the substance of draft article 63 and referred it to the drafting group.

Chapter 13. Time for suit

Draft article 64. Period of time for suit

204. The Commission approved the substance of draft article 64 and referred it to the drafting group.

Draft article 65. Extension of time for suit

205. A concern was expressed that it would be unfair to the claimant to allow the person against which the claim was made to control whether or not an extension of the time period would be granted. The suggestion was made that the following phrase should be deleted: "by a declaration to the claimant. This period may be further extended by another declaration or declarations." However, it was observed

that such extensions by declaration or agreement were mechanisms that already existed in the Hague-Visby and Hamburg Rules.

206. Concern was also expressed that prohibiting the suspension or interruption of the period of time for suit would operate to the detriment of claimants by weakening their legal position vis-à-vis the person against which the claim was made. Further, it was suggested that this could elicit a negative response from insurers, since it was thought that any extension of the time for suit would depend on the goodwill of the carrier. In order to alleviate that perceived problem, it was suggested that the following phrase be deleted from the draft provision: "The period provided in article 64 shall not be subject to suspension or interruption, but". There was some support for that view.

207. In response to those concerns, it was observed that the provision, as drafted, intended to maintain a balance between establishing legal certainty with respect to outstanding liabilities and maintaining flexibility in allowing the claimant to seek additional time to pursue legal action or settlement, if necessary. It was noted that it was particularly important to harmonize the international rules with respect to interruption and suspension, since those matters would otherwise be governed by the applicable law, which varied widely from jurisdiction to jurisdiction. It was feared that the result of such an approach would be forum shopping by claimants, a lack of transparency and an overall lack of predictability, all of which could prove costly. It was also observed that the two-year period of time for suit was longer than that provided for in the Hague-Visby Rules and that it was expected to provide sufficient time for claimants to pursue their actions or for such claims to be settled without the need for suspension or interruption. A number of delegations observed that the draft provision would require them to revise their national laws, but that it was felt that such a harmonizing measure was useful and appropriate in the circumstances. There was support in the Commission for retention of the provision as drafted.

208. After discussion, the Commission approved the substance of draft article 65 and referred it to the drafting group.

Draft article 66. Action for indemnity

209. Although a concern was expressed as to whether it should be possible for a person held liable to institute an action for indemnity after the expiration of the period of time for suit, that concern was not supported, and the Commission approved the substance of draft article 66 and referred it to the drafting group.

Draft article 67. Actions against the person identified as the carrier

210. A concern was raised that the bareboat charterer should not be included in draft article 67. By way of explanation, it was noted that the bareboat charterer had been included in the draft provision so as to provide the cargo claimant with the procedural tools necessary to take legal action against the bareboat charterer when that party had been identified as the carrier pursuant to draft article 39. There was support in the Commission for that view.

211. The Commission approved the substance of draft article 67 and referred it to the drafting group.

Chapter 14. Jurisdiction

General comment

212. The Commission was reminded that the Working Group had agreed that chapter 14 on jurisdiction should be subject to an "opt-in" declaration system, as set out in draft article 76, such that the chapter would apply only to Contracting States that had made a declaration to that effect. It was observed that as the chapter on jurisdiction did not contain a provision equivalent to draft article 77, paragraph 5, which provided that certain arbitration clauses or agreements that were inconsistent with the arbitration chapter would be held void, it was desirable that there be clarity regarding the interpretation of the "opt-in" mechanism. To that end, it was observed that the operation of the "opt-in" mechanism meant that a Contracting State that did not make such a declaration was free to regulate jurisdiction under the law applicable in that State. There was support in the Commission for that interpretation of draft article 76. In addition, it was observed that chapter 14 as a whole had been the subject of protracted discussions and represented a carefully balanced compromise, for which support was maintained.

Draft article 68. Actions against the carrier; and draft article 1, paragraphs 28 ("domicile") and 29 ("competent court")

213. The Commission approved the substance of draft article 68 and the definitions in draft article 1, paragraphs 28 and 29, and referred them to the drafting group.

Draft article 69. Choice of court agreements

214. A concern was expressed that as the consignee would be the most likely claimant in a case of loss of or damage to the goods, the consignee should not be bound to an exclusive jurisdiction clause pursuant to draft article 69, subparagraph 2 (c), without it having provided its consent or agreement to be so bound. There was some support in the Commission for that view.

215. However, it was again observed that Contracting States were free to refrain from exercising the "opt-in" provision in draft article 76, in which circumstances the State would simply apply its applicable law. One example given was that such a State would be free to regulate questions of jurisdiction arising out of a volume contract, including the circumstances in which a third party might be bound.

216. The Commission approved the substance of draft article 69 and referred it to the drafting group.

Draft article 70. Actions against the maritime performing party

217. The Commission approved the substance of draft article 70 and referred it to the drafting group.

Draft article 71. No additional bases of jurisdiction

218. The Commission approved the substance of draft article 71 and referred it to the drafting group.

Draft article 72. Arrest and provisional or protective measures

219. In reference to draft article 72, subparagraph (a), in particular with respect to fulfilling "the requirements of this chapter", it was observed that the court granting the provisional or protective measures would make a determination regarding its jurisdiction to determine a case upon its merits in light of the provisions set out in chapter 14. There was support in the Commission for that view.

220. The Commission approved the substance of draft article 72 and referred it to the drafting group.

Draft article 73. Consolidation and removal of actions

221. The Commission approved the substance of draft article 73 and referred it to the drafting group.

Draft article 74. Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance

222. The Commission approved the substance of draft article 74 and referred it to the drafting group.

Draft article 75. Recognition and enforcement

223. It was observed that following the decision of the Working Group to proceed with a full "opt-in" approach as opposed to a "partial opt-in" approach to the chapter on jurisdiction (see A/CN.9/616, paras. 245-252), certain consequential changes to the draft Convention had been made. However, it was observed that draft article 75, subparagraph 2 (b), which had been inserted into the text to accommodate the "partial opt-in" approach, had not been deleted when that approach was not approved by the Working Group. A proposal was made to delete draft article 75, subparagraph 2 (b), in order to correct the text. The Commission agreed with that proposal.

224. With that correction, the Commission approved the substance of draft article 75 and referred it to the drafting group.

Draft article 76. Application of chapter 14

225. The Commission approved the substance of draft article 76 and referred it to the drafting group.

Chapter 15. Arbitration

General comment

226. The Commission was reminded that the Working Group had agreed that, like chapter 14 on jurisdiction, chapter 15 on arbitration should be subject to an "opt-in" declaration system, as set out in draft article 80, such that the chapter would only apply to Contracting States that had made a declaration to that effect.

Draft article 77. Arbitration agreements

227. It was observed that there might be inconsistencies in the terminology used in the draft Convention in terms of describing the party instituting a claim, which was

described variously as "the person asserting a claim against the carrier" (draft art. 77, para. 2), the "claimant" (draft arts. 18 and 50, para. 5), and the "plaintiff" (draft arts. 68 and 70). There was support in the Commission for the suggestion that such terms be reviewed and standardized, to the extent advisable. In particular, it was noted that in chapters 14 and 15 the term "person asserting a claim against the carrier" should be used rather than the term "plaintiff" or "claimant", in order to exclude cases where a carrier had instituted a claim against a cargo owner.

228. Subject to making appropriate changes to the terminology used to refer to the claimant, the Commission approved the substance of draft article 77 and referred it to the drafting group.

Draft article 78. Arbitration agreement in non-liner transportation

229. It was observed that draft article 78, paragraph 2, was unclear in that it referred to the "arbitration agreement" in the chapeau, in subparagraph 2 (a) and elsewhere throughout chapter 15, but it referred to the "arbitration clause" in subparagraph 2 (b). It was also noted that some lack of clarity could result from different interpretations given to the terms "arbitration agreement" and "arbitration clause" in different jurisdictions. In response, it was noted that UNCITRAL instruments attempted to maintain consistent usage of terminology, such that "arbitration agreement" referred to the agreement of the parties to arbitrate, whether prior to a dispute or thereafter, in accordance with a provision in a contract or a separate agreement, whereas the "arbitration clause" referred to a specific contractual provision that contained the arbitration agreement.

230. By way of further explanation, it was observed that paragraph 1 of draft article 78 was not intended to apply to charterparties and that paragraph 2 of the provision was intended to include bills of lading into which the terms of a charterparty had been incorporated by reference. Further, the reference in draft article 78, subparagraph 2 (b), was intended to include as a condition that there be a specific arbitration clause and that reference to the general terms and conditions of the charterparty would not suffice.

231. In order to clarify the provision, it was suggested that paragraph 2 could be redrafted along the following lines:

> "2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:
>
> "(a) Identifies the parties to and the date of the charterparty or other contract excluded from the application of this Convention by reason of the application of article 6; and
>
> "(b) Incorporates by reference and specifically refers to the clause in the charterparty or other contract that contains the terms of the arbitration agreement."

232. With clarification along those lines, the Commission approved the substance of draft article 78 and referred it to the drafting group.

Draft article 79. Agreement to arbitrate after the dispute has arisen

233. A question was raised regarding how draft article 79 would be applied to a Contracting State that had opted in to the application of chapter 15 on arbitration, but had opted out of the application of chapter 14 on jurisdiction. In response, it was observed that the likely interpretation would be that the reference to chapter 14 would simply have no meaning, but that its inclusion in the text would not cause any harm. However, it was also observed that it would be unlikely that a Contracting State would opt into chapter 15 but opt out of chapter 14, as the two chapters were intended to be complementary so that, while the arbitration provisions did not change the existing arbitration regime, they would nonetheless prevent circumvention of the jurisdiction provisions through resorting to arbitration.

234. The Commission approved the substance of draft article 79 and referred it to the drafting group.

Draft article 80. Application of chapter 15

235. The Commission approved the substance of draft article 80 and referred it to the drafting group.

Chapter 16. Validity of contractual terms

Draft article 81. General provisions

236. It was observed that the liability of the shipper for breach of its obligations under the draft Convention was not subject to a monetary ceiling, unlike the carrier's liability, which was limited to the amounts set forth in draft articles 61 and 62. In order to achieve a greater balance of rights and obligations between carriers and shippers, it was suggested that draft article 81 should at least allow the parties to the contract of carriage to agree on a limit to the liability of the shipper, which was currently not possible. For that purpose, the following amendments were proposed to paragraph 2 of the draft article:

> "2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:
>
> "(a) Directly or indirectly excludes, reduces or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or
>
> "(b) Directly or indirectly excludes, reduces or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.
>
> "The contract of carriage may, however, provide for an amount of limitation of the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of obligations, provided that the claimant does not prove that the loss resulting from the breach of obligations was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result."

237. It was explained that during the preparation of the draft Convention, the Working Group had not been able to agree on a formula or method for limiting the

liability of the shipper. However, because draft articles 61 and 62 provided for a limitation of the carrier's liability, the carrier was in fact placed in a more favourable condition than the shipper. The proposed amendments would provide some remedy for that situation by allowing contractual limitation of the shipper's liability. The word "limits" in both subparagraph 2 (a) and subparagraph 2 (b) of draft article 81, it was suggested, should be replaced with the word "reduces" in order to better accommodate the freedom of contract envisaged by the additional subparagraph contained in that proposal. The additional text also reproduced some language from draft article 63 in order to set forth the conditions under which a contractual limitation of the shipper's obligations would not be enforceable, which mirrored the conditions under which the carrier would lose the benefit of limitation of liability under the draft Convention. That addition, it was stated, should be sufficient to address possible concerns that exculpatory clauses to the benefit of the shipper might deprive the carrier of any redress in the event that a shipper's reckless conduct (for instance, failure to provide information as to the dangerous nature of the goods) caused injury to persons or damage to the ship or other cargo.

238. There was support for that proposal, which was said to improve the balance of rights and obligations between carriers and shippers. It was said that in contrast with the carrier, whose liability was always based on fault, the shipper was exposed to instances of strict liability, for instance by virtue of draft articles 32 and 33. The notion of unlimited strict liability, however, was said to be unusual in many legal systems. Since it had not been possible for the Working Group to establish a limitation for the shipper's liability, the draft Convention should at least allow the parties to do so by contract. That possibility, it was further said, would enable shippers to obtain liability insurance under more predictable terms.

239. There were however strong objections to the proposed amendments. It was noted that the proper way for shippers and carriers to derogate from the provisions of the draft Convention that governed their mutual rights and obligations was by agreeing on deviations in a volume contract under draft article 82. It was noted, however, that even in the context of draft article 82, there were a number of provisions of the draft Convention from which the parties could not deviate. Those so-called "super-mandatory" provisions included, for instance, the carrier's obligations under draft article 15 and the shipper's obligations under draft articles 30 and 33. If freedom of contract was subject to limits even in the case of individually negotiated volume contracts, there were stronger reasons for freedom of contract to be excluded in routine cases to which the additional protection envisaged in draft article 82 did not apply.

240. It was also pointed out that, in practice, shippers were protected against excessive claims by the fact that their liability was limited to the amount of damage caused by their failure to fulfil their obligations under the draft Convention. As a matter of legislative policy, however, shippers should not be allowed to disclaim liability in those instances where the draft Convention imposed liability on shippers, since the breach of some of the shipper's obligations, in particular where dangerous goods were involved, might cause or contribute to damage to third parties or put human life and safety in jeopardy. At times when most general cargo in liner transportation was delivered to the carrier in closed containers, the risks involved in improper handling of dangerous goods due to misinformation by shippers could not

be overestimated. The safety of shipping required strict compliance by shippers with their obligations to provide adequate information about the cargo to the carrier.

241. There was also criticism of the proposed amendment from the viewpoint of the balance of interests it purported to achieve. It was also observed that it would be wrong to assume that the carrier was always in a stronger position vis-à-vis the shipper. A significant volume of shipping was nowadays arranged by large multinational corporations or intermediaries and they were often in a position to impose their terms on carriers. Draft article 82 provided the mechanism for commercially acceptable deviations, subject to a number of conditions and compliance with some basic obligations as a matter of public policy. There was some sympathy in respect of the search for mechanisms that might allow for some contractual relief for small shippers. However, many years of discussion of possible statutory limitation of the shipper's liability had been unsuccessful, both in the Working Group and during previous attempts, such as the negotiation of the Hamburg Rules. Offering the possibility of contractual limitation, in turn, was said to be insufficient in practice, since small shippers would seldom be in a position to obtain individually negotiated transport documents.

242. Having considered all the views that were expressed, the Commission decided to approve draft article 81 and refer it to the drafting group.

Draft article 82. Special rules for volume contracts

243. Concern was expressed with respect to the provision concerning volume contracts in draft article 82. One delegation reiterated its consistent and strong opposition to the inclusion of draft article 82 in its current from. In particular, it was suggested that the text, as currently drafted, allowed too broad an exemption from the mandatory regime established in the draft Convention. Since it was felt that a large number of contracts for the carriage of goods could fall into the definition of a volume contract, the concern was expressed that derogation from the obligations of the draft Convention would be widespread and could negatively affect smaller shippers. Further, it was thought that such a result would undermine the main goal of the draft Convention, which was to harmonize the law relating to the international carriage of goods. It was suggested that possible remedies to reduce the breadth of the provision could be to restrict the definition of "volume contract" (see para. 32 above) and to further protect weaker parties to the contract of carriage by requiring that the requirement in draft article 82, subparagraph 2 (b) that the volume contract be individually negotiated or that it prominently specify the sections of the contract containing any derogations should be amended to be conjunctive rather disjunctive. There was some support in the Commission for that position. There was also a proposal to allow States to make a reservation with respect to draft article 82.

244. Concern along the same lines was expressed with respect to the effect that the provision concerning volume contracts in draft article 82 could have on small liner carriers. In that respect, it was suggested that such carriers would not have sufficient bargaining power vis-à-vis large shippers and that such carriers would find themselves in the situation of having to accept very disadvantageous terms in cases where volume contracts allowed derogation from the mandatory provisions of the draft Convention.

245. The Commission was reminded that in addition to previous efforts that had been made in the Working Group to adjust the text of draft article 82 in order to ensure the protection of parties with weaker bargaining power, additional protection had been added to the draft text as recently as at the final session of the Working Group. In particular, it was noted that delegations at the final session of the Working Group had succeeded in amending the text of the draft provision through the addition of draft subparagraphs 2 (c) and (d). In doing so, it was noted that the Working Group had achieved a compromise acceptable to many of the delegations that had previously expressed their concerns regarding the protection of parties with weaker bargaining power (see A/CN.9/645, paras. 196-204). Support was expressed in the Commission that the compromise that had been reached should be maintained.

246. The Commission approved the substance of draft article 82 and referred it to the drafting group.

Draft article 83. Special rules for live animals and certain other goods

247. With a view to aligning the text of the draft article with the provisions of draft article 63, paragraph 1, it was agreed that the words "done with the intent to cause such loss or damage to the goods or the loss due to the delay or" should be added before the word "recklessly" in subparagraph (a).

248. Subject to that amendment, the Commission approved draft article 83 and referred it to the drafting group.

Chapter 17. Matters not governed by this Convention

Draft article 84. International conventions governing the carriage of goods by other modes of transport

249. It was pointed out that draft article 84 preserved only the application of international conventions that governed unimodal carriage of goods on land, on inland waterways or by air that were already in force at the time that the Convention entered into force. That solution was said to be too narrow. Instead, the draft Convention should expressly give way both to future amendments to existing conventions as well as to new conventions on the carriage of goods on land, on inland waterways and by air. It was noted, in that connection, that an additional protocol to the Convention on the Contract for the Carriage of Goods by Road (the "CMR") dealing with consignment notes in electronic form had recently been adopted under the auspices of the Economic Commission for Europe and that such amendments were common in the area of international transport. The Convention concerning International Carriage by Rail and Appendix B to that Convention containing the Uniform Rules concerning the Contract for International Carriage of Goods by Rail (the "CIM-COTIF"), for instance, had an amendment procedure as a result of which the 1980 Convention ("COTIF") had been replaced with the 1999 version. Furthermore, the draft Convention should also preserve the application of any future convention on multimodal transport contracts. It was said that the provisions of the draft Convention had been mainly designed with a view to sea carriage and that it was therefore advisable to leave room for further development of the law with respect to other modes of carriage.

250. It was suggested that the words "in force at the time this Convention enters into force" should be deleted. There was some support for that proposal. Although it

was said that additional protocols to existing international conventions might be seen as implicitly covered by the reference to the existing conventions they amended, the view was expressed that the draft Convention should not exclude the possibility of new instruments being developed in addition to or in replacement of the unimodal conventions contemplated by the draft article. That, it was proposed, should be done either by an expansion of the scope of the draft article or by way of appropriate reservations that Contracting States could be permitted to submit.

251. However, there were strong objections to the proposal that the draft Convention should also preserve the application of any future convention on other modes of transport that might have multimodal aspects. The draft Convention had been negotiated exactly for the purpose of covering door-to-door carriage, which in most cases meant "maritime plus" carriage. The purpose of the draft Convention would be defeated if it were to give way to any future instrument covering essentially the same type of carriage.

252. The views were divided as regards the impact of draft article 84 on future amendments to the conventions to which it referred. On the one hand, there was support for the proposition that the draft article should also encompass future amendments to existing conventions and that the draft article might need to be redrafted if that conclusion was not allowed by the current text. On the other hand, it was argued that the draft Convention should not give unlimited precedence to future amendments to those conventions. There was a risk that an amending protocol might expand the scope of application of an existing convention to such an extent that the convention in question might become applicable to multimodal carriage in circumstances other than those mentioned in draft article 84. The sensitive issue of localized damages was appropriately taken care of by draft article 27, which already envisaged future amendments to unimodal conventions so as to encompass, for instance, adjustments to liability limits that might be introduced in the future.

253. In view of the conflicting opinions that had been expressed on the matter, the Commission agreed to suspend its deliberations on the draft article.

254. Following informal consultations, it was proposed that the following phrase be inserted into the chapeau of the draft provision, after the phrase "enters into force": "including any future amendment thereto". Subject to the inclusion of a phrase along those lines, the Commission approved draft article 84 and referred it to the drafting group.

Draft article 85. Global limitation of liability

255. In response to a query as to the need for draft article 85, it was noted that the draft article aimed at solving situations where the carrier under the draft Convention was at the same time the ship owner under the 1976 Convention on Limitation of Liability for Maritime Claims (the "LLMC"), which subjected the combined amount of individual claims against the owner to a global liability limit. Thus, for example, in cases of a major accident where the entire cargo of a ship was lost, cargo claimants might have the right to submit individual claims up to a certain amount, but their claim might be reduced if the combined value of all claims exceeded the global limitation of liability under the other applicable convention. Global limitation of liability such as provided by the Convention on Limitation of Liability for

Maritime Claims (the "LLMC") or domestic law was an important element with a view to providing predictability in international sea carriage and should not be affected by the draft Convention.

256. There was some support for the view that the words "vessel owner" were unclear and possibly too restrictive, since the Convention on Limitation of Liability for Maritime Claims (the "LLMC"), for instance, also provided a global limit for claims against charterers and operators. One proposal to clarify the text was to replace the reference to "vessel owner" with a reference to international conventions or national laws regulating global limitation of liability "for maritime claims". Another proposal was to qualify the words "vessel owner" by the phrase "as defined by the respective instrument".

257. However, there was not sufficient support for either proposal. It was pointed out that the draft article merely preserved the application of other instruments, without venturing into the definition of the categories of persons to which those instruments applied. Replacing the term "vessel owners" with a reference to "maritime claims" in turn, would not be appropriate, since the draft article also preserved the application of rules on global limitation of liability of owners of inland navigation vessels and not only of seagoing vessels.

258. The Commission approved draft article 85 and referred it to the drafting group.

Draft article 86. General average

259. There was no support for a proposal to insert a definition of the term "general average", but the Commission agreed that the various language versions should be reviewed to ensure appropriate translation.

260. The Commission approved draft article 86 and referred it to the drafting group.

Draft article 87. Passengers and luggage

261. The Commission approved the substance of draft article 87 and referred it to the drafting group.

Draft article 88. Damage caused by nuclear incident

262. After requesting the Secretariat to ascertain the current status of the nuclear conventions listed in the provision, the Commission approved the substance of draft article 88 and referred it to the drafting group.

Chapter 18. Final clauses

Draft article 89. Depositary

263. The Commission approved the substance of draft article 89 and referred it to the drafting group.

Draft article 90. Signature, ratification, acceptance, approval or accession

264. In connection with draft article 90, the attention of the Commission was drawn to an invitation from the Minister of Transport of the Netherlands, the Mayor of Rotterdam and the Executive Board of the Port of Rotterdam Authority for States to visit the port of Rotterdam in the Netherlands in September 2009 to participate in an

event for the celebration of the adoption of the draft Convention (see annex II). Further, if approved by the General Assembly, the Rotterdam event could inolude a ceremony for the signing of the draft Convention, once adopted. The event was also envisioned to include a seminar under the auspices of UNCITRAL and the International Maritime Committee (CMI). The Commission was informed that the Government of the Netherlands was prepared to assume all additional costs that might be incurred by convening a signing ceremony outside the premises of the United Nations so the organization of the proposed event and the signing ceremony would not require additional resources under the United Nations budget.

265. The proposal to host such an event in Rotterdam, the Netherlands, was accepted by acclamation by the Commission. The Commission expressed its gratitude for the generosity of the Government of the Netherlands and the City and Port of Rotterdam in offering to act as host for such an event.

266. It was observed that, given the strong positive response of the Commission to the invitation to attend a signing ceremony in Rotterdam, the Netherlands, the text of draft article 90 could be adjusted to include Rotterdam as the place at which the draft Convention would be opened for signature for a short time and the instrument could then be opened for further signature for a longer period at United Nations Headquarters in New York. There was broad support for that suggestion and the Commission agreed to delete the square brackets around the phrase "at [...] from [...] to [...] and thereafter", as well as the square brackets after the word "at", and to insert "Rotterdam, the Netherlands," after "at".

267. Following the insertion of "Rotterdam, the Netherlands," into the first blank space in the draft provision and the deletion of the square brackets as indicated above, the Commission approved the substance of draft article 90 and referred it to the drafting group.

Draft article 91. Denunciation of other conventions

268. The Commission approved the substance of draft article 91 and referred it to the drafting group.

Draft article 92. Reservations

Proposal regarding draft article 92

269. A number of concerns with respect to the text of the draft Convention were reiterated. The Commission was reminded that concern had been raised regarding the perceived failure of the draft Convention to address specific problems relating to transport partially performed on land, on inland waterways and by air. Some examples were given in this regard, such as the failure of draft article 18, paragraph 3, to take into account non-maritime events, such as a fire on a vehicle other than a ship, or the failure of draft article 26 to address the situation of the carriage of goods in an open, unsheeted road cargo vehicle. Further, it was said that the definition of the term "volume contract" did not address the situation where the contract provided for a series of shipments by road but one single shipment by sea.

270. In addition to those perceived shortcomings in dealing with non-maritime transport, it was suggested that there was no justification for applying the draft Convention to cases where the inland leg of transport was longer than the maritime

leg, in particular when the liability limit of the carrier in the case of non-localized damage would be lower than the Convention on the Contract for the Carriage of Goods by Road (the "CMR"), the Convention concerning International Carriage by Rail (the "COTIF") or the Montreal Convention. It was further suggested that draft article 27 placed an unfair burden of proof on the shipper to determine when loss or damage could be said to be localized. Concern was also raised that, where other conventions provided a time shorter than two years for suit, it would prejudice the shipper who was relying on the two-year rule in the draft Convention if the carrier could prove that the damage occurred on a land leg to which another convention with a shorter time for suit applied. Further concerns were expressed regarding the failure of the draft Convention to provide for a direct action against the carrier performing the carriage by road or rail and for not allowing parties to opt out of the network system and adopt a single liability regime pursuant to draft article 81. In addition, it was suggested that the draft Convention would lead to a fragmentation of laws on multimodal transport contracts because of its "maritime plus" nature.

271. In order to address those perceived shortcomings in the draft Convention, it was suggested that the following text should be inserted in place of draft article 92:

"Article 92. Reservations

"1. Any State may, at the time of signature, ratification, acceptance or accession, or at any time thereafter, reserve the right to exclude the application of this Convention to contracts that provide for carriage by sea and by other modes of transport in addition to sea carriage.

"2. No other reservation is permitted to this Convention."

272. There was some support for that proposal, in particular for the purpose of introducing additional flexibility into the draft Convention so as to allow a greater number of States to ratify it. Acceptance of the proposal, it was suggested, would lead to more widespread ratification of the international legal regime in respect of maritime transport. This would be preferable to achieving greater uniformity of the law, but at the price of ratification by fewer States. Although some delegations were not in favour of the text as drafted, they nonetheless favoured the pursuit of a possible additional compromise that would attract a greater number of States to ratify the Convention.

273. However, strong objections to the proposal were raised. It was said that the door-to-door nature of the draft Convention to provide for the commercial needs of modern container transport was an essential characteristic of the regime and that to allow States to make a reservation to such an integral part of the draft Convention would be tantamount to dismantling the instrument and nullifying years of negotiation, compromise and work that had gone into its preparation. The proposed reservation was said to be an attempt to reopen the decision that had been made regarding the door-to-door nature of the draft Convention and to attempt to re-insert the concept of mandatory national law to narrow the scope of the draft Convention, an approach that had been considered and discarded by the Working Group in pursuit of broader consensus. Such a resort to national law was said to be a dangerous move that would be contrary to the need for harmonization of the international rules governing the transport of goods, thus resulting in fragmentation of the overall regime and creating disharmony and a lack of transparency regarding the applicable rules. Further, it was pointed out that parties to the contract of

carriage always had the right to negotiate a port-to-port agreement rather than a door-to-door contract and that, in many respects, the draft Convention had left certain matters open to applicable law, thus leaving ample scope for national rules in some areas.

274. In addition, it was noted that the perceived problems in the draft Convention said to have led to the proposal had been thoroughly considered by the Working Group and by the Commission and that the prevailing view did not regard the solutions adopted in those areas as unsatisfactory. It was strongly felt that adopting the proposed reservation would be to act in a manner contrary to the delicate compromise that was reached by the Working Group in January 2008 (see A/CN.9/645, paras. 196-204). In that vein, a number of delegations cited their own difficulties with certain aspects of the Convention as currently drafted, including contentious provisions such as draft article 18, paragraph 3, or even requests to remove entire chapters, but noted their determination to maintain the elements of the compromise agreement, encouraging those who were more reluctant to relinquish their criticism of the draft Convention and join the broader consensus. A strong desire was evinced to retain the various compromises resulting in the current text of the draft Convention, lest the adjustment of one or two points of agreement lead to unravelling the entire compromise and reopening the discussion on a host of related issues. As such, there was strong support in the Commission for retaining the text of draft article 92 as currently drafted.

Proposal for draft article 92 bis

275. Since a number of delegations had opposed as being too radical the proposal to seek broader approval of the draft Convention by providing for a reservation to restrict the application of the draft Convention to maritime transport, but had left open the possibility of coming to another compromise, a further proposal was made. In an effort to enable States that had expressed concerns regarding the application of national law and the level of the carrier's limitation on liability to ratify the text, the following new provision was proposed:

"Article 92 bis. Special declarations

"A State may according to article 93 declare that:

"(a) It will apply the Convention only to maritime carriage; or

"(b) It will, for a period of time not exceeding ten years after entry into force of this Convention, substitute the amounts of limitation of liability set out in article 61, paragraph 1, by the amounts set out in article 6, paragraph 1 (a) of the United Nations Convention on Carriage of Goods by Sea, concluded at Hamburg on 31 March 1978. Such a declaration must include both amounts."

276. In support of the proposal, it was noted that subparagraph (a) of the proposed article 92 bis was intended to be more limited than the other new reservation proposal (see para. 271 above) and thus it presented a less controversial method of narrowing the scope of application of the Convention to maritime carriage. Further, it was suggested that subparagraph (b) of the proposed article 92 bis could accommodate those who had expressed concerns about the level of the limitation on a carrier's liability currently in draft article 61, in that it offered those States the

opportunity to adopt the level of limitation for the carrier's liability in the Hamburg Rules and to phase in their adherence to the higher limits over a 10-year period. That approach, it was suggested, could encourage broader approval of the draft Convention.

277. Although there was some support for the proposal, in particular for subparagraph (b) of the proposal, which was described as an innovative idea to gain broader acceptance of the text, the prevailing view in the Commission was that the compromise that had been reached among a large number of States in January 2008 (see A/CN.9/645, paras. 196-204) should be maintained, which precluded adoption of the proposal. Further, concerns were reiterated regarding the need to retain the door-to-door nature of the draft Convention and the likelihood that approval of the proposal could have the undesirable effect of causing the entire compromise to unravel and lead to renewed discussion on a number of issues of concern to various delegations.

278. The Commission decided against the inclusion of a new draft article 92 bis in the text of the Convention.

Draft article 93. Procedure and effect of declarations

279. There was support for the view that the second sentence of paragraph 1 of draft article 93, which required the declarations referred to therein, including the declaration contemplated in draft article 94, paragraph 1, to be made at the time of signature, ratification, acceptance, approval or accession, seemed to contradict paragraph 1 of draft article 94, which allowed a Contracting State to amend a declaration made pursuant to that article by submitting another declaration at any time. It was noted that the apparent contradiction was not limited to draft article 94, paragraph 1, but also appeared to exist in respect of draft article 95, paragraph 2. It was pointed out that in order for the declarations envisaged in draft articles 94 and 95 to operate properly they must be capable of being amended from time to time to allow information about extensions to more territorial units or about changes in competence to be communicated to other Contracting States.

280. For the purpose of eliminating the perceived contradiction, the Commission agreed to insert the word "initial" before the word "declarations" in the second sentence of paragraph 1 of draft article 93. Subject to that amendment, the Commission approved the draft article and referred it to the drafting group.

Draft article 94. Effect in domestic territorial units

281. It was pointed out that draft article 94 contained an important provision to facilitate the ratification of the draft Convention by multi-unit States where legislative competence on private law matters was shared. It was noted, in that connection, that paragraph 3 of the draft article dealt with the effect that the extension of the Convention to some but not all the territorial units of a Contracting State might have on the geographic scope of application of the Convention.

282. Paragraph 3, it was further noted, was based on a similar provision in article 93, paragraph 3, of the United Nations Sales Convention. However, it was said that paragraph 3 required some additional refinement since the definition of the geographic scope of application of the draft Convention under draft article 5 was more elaborate than that of the United Nations Sales Convention and was not linked

to the notion of place of business. In order to address that problem, it was suggested that paragraph 3 of the draft article should be replaced with text along the following lines:

> "If, by virtue of a declaration pursuant to this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, the relevant connecting factor for the purposes of articles 1, paragraph 28, 5, paragraph 1, 20, subparagraph 1 (a), and 69, subparagraph 1 (b), is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends."

283. The Commission generally recognized the need for addressing the problem that had been identified, but was of the view that it might be preferable to avoid references to connecting factors in specific provisions of the draft Convention, since, at least as far as draft article 5 was concerned, not all of the connecting factors needed to be located in one and the same Contracting State in order to trigger the application of the draft Convention.

284. The Commission approved the substance of draft article 94 and referred it to the drafting group, with a request to propose an alternative text to draft paragraph 3 to reflect its deliberations.

Draft article 95. Participation by regional economic integration organizations

285. The view was expressed that paragraph 3 of draft article 95, which stated that reference to a "Contracting State" or "Contracting States" in the Convention applied equally to a regional economic integration organization when the context so required, seemed to contradict the last sentence of paragraph 1, which provided that when the number of Contracting States was relevant in the draft Convention, the regional economic integration organization did not count as a Contracting State in addition to its member States that were Contracting States.

286. In response, it was observed that the interpretative provision in paragraph 3 was useful since international organizations were not generally regarded as equals to States under public international law and would not therefore be necessarily regarded as being covered by references to "Contracting States" in the Convention. To the extent, however, that they joined the Convention in their own right, it would be appropriate to extend to them, as appropriate, some of the provisions that applied to Contracting States, such as, for example, draft article 93 on the procedure and effect of declarations. The last sentence of paragraph 1, in turn, made it clear that a regional economic integration organization would not count as a "State" where the number of Contracting States was relevant, for instance in connection with the minimum number of ratifications for the entry into force of the Convention under article 96, paragraph 1. It was further noted that provisions along the lines of the draft article had become customary in many international conventions.

287. The Commission approved draft article 95 and referred it to the drafting group.

Draft article 96. Entry into force

288. The Commission approved draft article 96 and referred it to the drafting group.

Draft article 97. Revision and amendment

289. The Commission approved draft article 97 and referred it to the drafting group.

Draft article 98. Denunciation of this Convention

290. The Commission approved draft article 98 and referred it to the drafting group.

Signature clause

291. The text of the draft signature clause was as follows:

"DONE at [...], this [...] day of [...], [...], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

"IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention."

292. The Commission approved the substance of the signature clause.

Title of the convention

293. The Commission approved the title "Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea" for the draft Convention.

Preamble

294. The Commission considered a proposal to insert the following text as a draft preamble:

"*The States Parties to this Convention,*

"*Reaffirming* their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

"*Convinced* that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality, equity and common interest and to the well-being of all peoples,

"*Recognizing* the significant contribution of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25 August 1924, and its amending Protocols, and of the United Nations Convention on the Carriage of Goods by Sea, signed in Hamburg on 31 March 1978, to the harmonization of the law governing the carriage of goods by sea,

"*Mindful* of the technological and commercial developments that have taken place since the adoption of those conventions and of the need to modernize and consolidate them,

"*Noting* that shippers and carriers do not have the benefit of a binding universal regime to support the operation of contracts of carriage involving various modes of transport,

"*Believing* that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

"*Have agreed as follows*:"

295. The Commission agreed to delete the word "amending" before the word "Protocols" in the third paragraph of the draft preamble. The Commission also agreed to reverse the order of the words "modernize and consolidate" in the fourth paragraph. The Commission further agreed to insert the word "maritime" before the word "carriage" in the fifth paragraph and to replace the word "various" with the word "other" in the same paragraph.

296. Subject to those amendments, the Commission approved the substance of the draft preamble and referred it to the drafting group.

C. Report of the drafting group

297. The Commission requested a drafting group established by the Secretariat to review the draft Convention with a view to ensuring consistency between the various language versions. At the close of its deliberations on the draft Convention, the Commission considered the report of the drafting group and approved the draft Convention. The Commission requested the Secretariat to review the text of the draft Convention from a purely linguistic and editorial point of view before its adoption by the General Assembly.

D. Decision of the Commission and recommendation to the General Assembly

298. At its 887th meeting, on 3 July 2008, the Commission adopted by consensus the following decision and recommendation to the General Assembly:

"*The United Nations Commission on International Trade Law*,

"*Recalling* that at its thirty-fourth and thirty-fifth sessions, in 2001 and 2002, it entrusted its Working Group III (Transport Law) with the preparation of an international legislative instrument governing door-to-door transport operations that involve a sea leg,

"*Noting* that the Working Group devoted thirteen sessions, held from 2002 to 2008, to the preparation of a draft convention on the carriage of goods wholly or partly by sea,

"*Having* considered the articles of the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea at its forty-first session, in 2008,

"*Noting* the fact that all States and interested international organizations were invited to participate in the preparation of the draft Convention at all the

sessions of the Working Group and at the forty-first session of the Commission, either as a member or as an observer, with a full opportunity to speak,

"*Also noting* that the text of the draft Convention was circulated for comment before the forty-first session of the Commission to all Governments and intergovernmental organizations invited to attend the meetings of the Commission and the Working Group as observers and that such comments were before the Commission at its forty-first session (A/CN.9/658 and Add.1-14),

"*Considering* that the draft Convention has received sufficient consideration and has reached the level of maturity for it to be generally acceptable to States,

"*Conscious* of the large and growing number of situations where transport, in particular transport of containerized goods, is operated under door-to-door contracts,

"*Convinced* that the modernization and harmonization of rules governing door-to-door transport operations that involve a sea leg would reduce legal obstacles to the flow of international trade, promote trade among all States on a basis of equality, equity and common interest, and thereby significantly contribute to the development of harmonious international economic relations and the well-being of all peoples,

"*Expressing* its appreciation to the Comité Maritime International for the advice it provided during the preparation of the draft Convention,

"1. *Submits* to the General Assembly the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, as set forth in annex I to the present report;

"2. *Recommends* that the General Assembly, taking into account the extensive consideration given to the draft Convention by the Commission and its Working Group III (Transport Law), consider the draft Convention with a view to adopting, at its sixty-third session, on the basis of the draft Convention approved by the Commission, a United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea and authorizing a signing ceremony to be held [as soon as practicable in 2009] in Rotterdam, the Netherlands, upon which the Convention would be open for signature by States."

IV. Procurement: progress report of Working Group I

299. At its thirty-sixth and thirty-seventh sessions, in 2003 and 2004, the Commission considered[7] the possible updating of the *UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment*[8] on the basis of notes by the Secretariat (A/CN.9/539 and Add.1 and A/CN.9/553).[9] At its

[7] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

[8] United Nations publication, Sales No. E.98.V.13.

[9] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17),

thirty-seventh session, the Commission agreed that the Model Law would benefit from being updated to reflect new practices, in particular those which resulted from the use of electronic communications in public procurement, and the experience gained in the use of the Model Law as a basis for law reform in public procurement as well as possible additional issues. The Commission decided to entrust the preparation of proposals for the revision of the Model Law to its Working Group I (Procurement) and gave the Working Group a flexible mandate to identify the issues to be addressed in its deliberations. The Commission noted that, in updating the Model Law, care should be taken not to depart from the basic principles of the Model Law and not to modify the provisions whose usefulness had been proven.[10]

300. The Working Group commenced its work pursuant to that mandate at its sixth session (Vienna, 30 August-3 September 2004). At that session, it decided to proceed with the in-depth consideration of the topics suggested in the notes by the Secretariat (A/CN.9/WG.I/WP.31 and A/CN.9/WG.I/WP.32)[11] in sequence at its future sessions (A/CN.9/568, para. 10).

301. At its thirty-eighth and thirty-ninth sessions, in 2005 and 2006, the Commission took note of the reports of the sixth (Vienna, 30 August-3 September 2004), seventh (New York, 4-8 April 2005), eighth (Vienna, 7-11 November 2005) and ninth (New York, 24-28 April 2006) sessions of Working Group I (A/CN.9/568, A/CN.9/575, A/CN.9/590 and A/CN.9/595). At its thirty-ninth session, the Commission recommended that the Working Group, in updating the Model Law and the Guide, should take into account the question of conflicts of interest and consider whether any specific provisions addressing that question in the Model Law would be warranted.[12]

302. At its fortieth session, the Commission had before it the reports of the tenth (Vienna, 25-29 September 2006) and eleventh (New York, 21-25 May 2007) sessions of the Working Group (A/CN.9/615 and A/CN.9/623).[13] The Commission was informed that the Working Group had continued to consider the following topics: (a) the use of electronic means of communication in the procurement process; (b) aspects of the publication of procurement-related information, including revisions to article 5 of the Model Law and the publication of forthcoming procurement opportunities; (c) the procurement technique known as the electronic reverse auction; (d) abnormally low tenders; and (e) the method of contracting known as the framework agreement.

303. At its current session, the Commission took note of the reports of the twelfth (Vienna, 3-7 September 2007) and thirteenth (New York, 7-11 April 2008) sessions of the Working Group (A/CN.9/640 and A/CN.9/648).

304. At its twelfth session, the Working Group adopted the timeline for its deliberations, later modified at its thirteenth session (A/CN.9/648, annex), and agreed to bring an updated timeline to the attention of the Commission on a regular basis.

---

paras. 225-230, and ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 79-82.

[10] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 81-82.

[11] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 171.

[12] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 192.

[13] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 166-169.

305. At its thirteenth session, the Working Group held an in-depth consideration of the issue of framework agreements on the basis of drafting materials contained in notes by the Secretariat (A/CN.9/WG.I/WP.52 and Add.1 and A/CN.9/WG.I/WP.56) and agreed to combine the two approaches proposed in those documents, so that the Model Law, where appropriate, would address common features applicable to all types of framework agreement together, in order to avoid, inter alia, unnecessary repetition, while addressing distinct features applicable to each type of framework agreement separately.

306. At that session, the Working Group also discussed the issue of suppliers' lists, the consideration of which was based on a summary of the prior deliberations of the Working Group on the subject (A/CN.9/568, paras. 55-68, and A/CN.9/WG.I/WP.45 and Add.1) and decided that the topic would not be addressed in the Model Law, for reasons that would be set out in the Guide to Enactment.

307. The Commission commended the Working Group and the Secretariat for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices and techniques in the Model Law. The Working Group was invited to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised Model Law, together with its Guide to Enactment, within a reasonable time. (For the forthcoming two sessions of the Working Group, see paras. 397 and 398 below.)

V. Arbitration and conciliation: progress report of Working Group II

308. The Commission recalled that at its thirty-ninth session, in 2006, it had agreed that Working Group II (Arbitration and Conciliation) should undertake a revision of the Arbitration Rules of the United Nations Commission on International Trade Law (the UNCITRAL Arbitration Rules).

309. At that session, the Commission noted that, as one of the early instruments developed by UNCITRAL in the field of arbitration, the UNCITRAL Arbitration Rules were widely recognized as a very successful text, having been adopted by many arbitration centres and used in many different instances, for example in investor-State disputes. In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of the Rules should not alter the structure of the text, its spirit or its drafting style and should respect the flexibility of the text rather than make it more complex. It was suggested that the Working Group should undertake to define carefully the list of topics that might need to be addressed in a revised version of the UNCITRAL Arbitration Rules.[14]

310. At its fortieth session, in 2007, the Commission noted that the UNCITRAL Arbitration Rules had not been amended since their adoption in 1976 and that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL

[14] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 184.

Arbitration Rules had provided useful guidance to the Working Group in its deliberations to date and should continue to be a guiding principle for its work.[15]

311. At that session, the Commission noted that broad support had been expressed in the Working Group for a generic approach that sought to identify common denominators that applied to all types of arbitration irrespective of the subject matter of the dispute, in preference to dealing with specific situations. However, the Commission noted that the extent to which the revised UNCITRAL Arbitration Rules should include more detailed provisions concerning investor-State dispute settlement or administered arbitration remained to be considered by the Working Group at future sessions.[16]

312. At its current session, the Commission had before it the reports of the forty-seventh (Vienna, 10-14 September 2007) and forty-eighth (New York, 4-8 February 2008) sessions of the Working Group (A/CN.9/641 and A/CN.9/646). The Commission commended the Working Group for the progress made regarding the revision of the UNCITRAL Arbitration Rules and the Secretariat for the quality of the documentation prepared for the Working Group.

313. The Commission noted that the Working Group had discussed at its forty-eighth session the extent to which the revised UNCITRAL Arbitration Rules should include more detailed provisions concerning investor-State dispute settlement or administered arbitration. The Commission noted that the Working Group had decided to proceed with its work on the revision of the UNCITRAL Arbitration Rules in their generic form and to seek guidance from the Commission on whether, after completion of its current work on the Rules, the Working Group should consider in further depth the specificity of treaty-based arbitration and, if so, which form that work should take (A/CN.9/646, para. 69).

314. After discussion, the Commission agreed that it would not be desirable to include specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves and that any work on investor-State disputes that the Working Group might have to undertake in the future should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form. As to timing, the Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. As to the scope of such future work, the Commission agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution. Written observations regarding that issue were presented by one delegation (A/CN.9/662) and a statement was also made on behalf of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises. The Commission was of the view that, as noted by the Working Group at its forty-eighth session (A/CN.9/646, para. 57), the issue of transparency as a desirable objective in investor-State arbitration should be addressed by future work. As to the form that any future work product might take, the Commission noted that various possibilities had been envisaged by the Working Group (ibid., para. 69) in the field of treaty-based arbitration, including the preparation of instruments such as model clauses,

[15] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 174.
[16] Ibid., para. 175.

specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties. The Commission decided that it was too early to make a decision on the form of a future instrument on treaty-based arbitration and that broad discretion should be left to the Working Group in that respect. With a view to facilitating consideration of the issues of transparency in treaty-based arbitration by the Working Group at a future session, the Commission requested the Secretariat, resources permitting, to undertake preliminary research and compile information regarding current practices. The Commission urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in investor-State arbitration. It was emphasized that, when composing delegations to the Working Group sessions that would be devoted to that project, member States and observers should seek to achieve the highest level of expertise in treaty law and treaty-based investor-State arbitration.

315. The Commission expressed the hope that the Working Group would complete its work on the revision of the UNCITRAL Arbitration Rules in their generic form, so that the final review and adoption of the revised Rules would take place at the forty-second session of the Commission, in 2009.

316. With respect to future work in the field of settlement of commercial disputes, the Commission recalled that the issue of arbitrability and online dispute resolution should be maintained by the Working Group on its agenda, as decided by the Commission at its thirty-ninth session. (For the forthcoming two sessions of the Working Group, see paras. 397 and 398 below.)

VI. Insolvency law

A. Progress report of Working Group V

317. The Commission recalled that at its thirty-ninth session, in 2006, it had agreed that: (a) the topic of the treatment of corporate groups in insolvency was sufficiently developed for referral to Working Group V (Insolvency Law) for consideration in 2006 and that the Working Group should be given the flexibility to make appropriate recommendations to the Commission regarding the scope of its future work and the form it should take, depending on the substance of the proposed solutions to the problems that the Working Group would identify under that topic; and (b) post-commencement finance should initially be considered as a component of the work to be undertaken on insolvency of corporate groups, with the Working Group being given sufficient flexibility to consider any proposals for work on additional aspects of the topic.

318. The Commission noted with appreciation the progress of the Working Group regarding consideration of the treatment of corporate groups in insolvency as reflected in the reports on its thirty-third (Vienna, 5-9 November 2007) and thirty-fourth (New York, 3-7 March 2008) sessions (A/CN.9/643 and A/CN.9/647) and commended the Secretariat for the working papers and reports prepared for those sessions.[17]

[17] Ibid., subparas. 209 (a) and (b).

B. Facilitation of cooperation and coordination in cross-border insolvency proceedings

319. The Commission recalled that at its thirty-ninth session, in 2006, it had agreed that initial work to compile information on practical experience with negotiating and using cross-border insolvency agreements should be facilitated informally through consultation with judges and insolvency practitioners and that a preliminary progress report on that work should be presented to the Commission for further consideration at its fortieth session, in 2007.[18] At the first part of its fortieth session (Vienna, 25 June-12 July 2007) the Commission considered a preliminary report reflecting experience with respect to negotiating and using cross-border insolvency protocols (A/CN.9/629) and emphasized the practical importance of facilitating cross-border cooperation in insolvency cases. It expressed its satisfaction with respect to the progress made on the work of compiling practical experience with negotiating and using cross-border insolvency agreements and reaffirmed that that work should continue to be developed informally by the Secretariat in consultation with judges, practitioners and other experts.[19]

320. At its present session, the Commission had before it a note by the Secretariat reporting on further progress with respect to that work (A/CN.9/654). The Commission noted that further consultations had been held with judges and insolvency practitioners and a compilation of practical experience, organized around the outline of contents annexed to the previous report to the Commission (A/CN.9/629), had been prepared by the Secretariat. Because of timing and translation constraints, that compilation could not be submitted to the present session of the Commission.

321. The Commission expressed its satisfaction with respect to the progress made on the work of compiling practical experience with negotiating and using cross-border insolvency agreements. It decided that the compilation should be presented as a working paper to Working Group V (Insolvency Law) at its thirty-fifth session (Vienna, 17-21 November 2008) for an initial discussion. Working Group V could then decide to continue discussing the compilation at its thirty-sixth session in April and May of 2009 and make its recommendations to the forty-second session of the Commission, in 2009, bearing in mind that coordination and cooperation based on cross-border insolvency agreements were likely to be of considerable importance in searching for solutions in the international treatment of enterprise groups in insolvency. The Commission decided to plan the work at its forty-second session, in 2009, to allow it to devote, if necessary, time to discussing recommendations of Working Group V. (For the decision on the length of the forty-second session of the Commission, see para. 395 below.) (For the conclusions of the Commission regarding insolvency matters that are of concern to Working Group VI (Security Interests), see para. 326 below.)

[18] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), subpara. 209 (c).

[19] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 190 and 191.

VII. Security interests: progress report of Working Group VI

322. At the first part of its fortieth session (Vienna, 25 June-12 July 2007), the Commission considered a note by the Secretariat entitled "Possible future work on security rights in intellectual property" (A/CN.9/632).[20] The note took into account the conclusions reached at a colloquium on security rights in intellectual property (Vienna, 18 and 19 January 2007), which had been organized by the Secretariat in cooperation with the World Intellectual Property Organization and during which several suggestions were made with respect to adjustments that would need to be made to the draft Legislative Guide on Secured Transactions ("the draft Legislative Guide") to address issues specific to intellectual property financing.[21]

323. At that session, the Commission noted that a significant part of corporate wealth was included in intellectual property. It was also noted that coordination between secured transactions law and intellectual property law under the regimes existing in many States was not sufficiently developed to accommodate financing practices in the context of which credit was extended with intellectual property being used as security. In addition, it was noted that the draft Legislative Guide did not provide sufficient guidance to States as to the adjustments that would need to be made to address the needs of financing practices relating to intellectual property. Moreover, it was noted that work should be undertaken as expeditiously as possible to ensure that the draft Legislative Guide gave complete and comprehensive guidance in that regard.[22] In order to provide sufficient guidance to States as to the adjustments that they might need to make in their laws to avoid inconsistencies between secured financing law and intellectual property law, the Commission decided to entrust Working Group VI (Security Interests) with the preparation of an annex to the draft Legislative Guide specifically dealing with security rights in intellectual property ("the Annex to the Legislative Guide").[23]

324. At its resumed fortieth session (Vienna, 10-14 December 2007), the Commission finalized and adopted the *UNCITRAL Legislative Guide on Secured Transactions* on the understanding that the annex to the *Guide* would be prepared subsequently.[24]

325. At its current session, the Commission had before it the report (A/CN.9/649) of Working Group VI on the work of its thirteenth session (New York, 19-23 May 2008). The Commission noted with satisfaction the good progress made during the initial discussions at that session, based on the note by the Secretariat entitled "Security rights in intellectual property rights" (A/CN.9/WG.VI/WP.33 and Add.1), which had enabled the Working Group to request the Secretariat to prepare a first draft of the annex to the *Guide* dealing with security rights in intellectual property (A/CN.9/649, para. 13).

---

[20] Ibid., para. 155.

[21] UNCITRAL Second International Colloquium on Secured Transactions: Security Interests in Intellectual Property Rights, held in Vienna on 18 and 19 January 2007; for further information about the Colloquium, see the UNCITRAL website (http://www.uncitral.org/uncitral/en/commission/colloquia/2secint.html).

[22] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 156.

[23] Ibid., paras. 157 and 162.

[24] Ibid., part II, paras. 99 and 100.

326. The Commission also noted that Working Group VI was not able to reach agreement as to whether certain matters related to the impact of insolvency on a security right in intellectual property (see A/CN.9/649, paras. 98-102) were sufficiently linked with secured transactions law in order to justify their discussion in the annex to the *Guide*. Working Group VI had decided to revisit those matters at a future meeting and to recommend that Working Group V (Insolvency Law) be requested to consider them. The Commission decided that Working Group V should be informed and invited to express any preliminary opinion at its next session. It was also decided that, should any remaining issue require joint consideration by the two Working Groups after that session, the Secretariat should have the discretion to organize, after consulting with the chairpersons of the two Working Groups, a joint discussion of the impact of insolvency on a security right in intellectual property when the two Working Groups meet back to back in the Spring of 2009. (For the subsequent two sessions of Working Group VI and of Working Group V, see paras. 397 and 398 below.)

VIII. Possible future work in the area of electronic commerce

327. In 2004, having completed its work on the Convention on the Use of Electronic Communications in International Contracts, Working Group IV (Electronic Commerce) requested the Secretariat to continue monitoring various issues related to electronic commerce, including issues related to cross-border recognition of electronic signatures, and to publish the results of its research with a view to making recommendations to the Commission as to whether future work in those areas would be possible (see A/CN.9/571, para. 12).

328. In 2005, the Commission took note of the work undertaken by other organizations in various areas related to electronic commerce and requested the Secretariat to prepare a more detailed study, which should include proposals as to the form and nature of a comprehensive reference document discussing the various elements required to establish a favourable legal framework for electronic commerce, which the Commission might in the future consider preparing with a view to assisting legislators and policymakers around the world.[25]

329. In 2006, UNCITRAL considered a note prepared by the Secretariat pursuant to that request (A/CN.9/604). The note identified the following areas as possible components of a comprehensive reference document: (a) authentication and cross-border recognition of electronic signatures; (b) liability and standards of conduct for information-services providers; (c) electronic invoicing and legal issues related to supply chains in electronic commerce; (d) transfer of rights in tangible goods and other rights through electronic communications; (e) unfair competition and deceptive trade practices in electronic commerce; and (f) privacy and data protection in electronic commerce. The note also identified other issues that could be included in such a document, although in a more summary fashion: (a) protection of intellectual property rights; (b) unsolicited electronic communications (spam); and (c) cybercrime.

[25] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 214.

330. At that session, there was support for the view that the task of legislators and policymakers, in particular in developing countries, might be greatly facilitated if the Commission were to formulate a comprehensive reference document dealing with the topics identified by the Secretariat. Such a document, it was also said, might also assist the Commission to identify areas in which it might itself undertake future harmonization work. However, there were also concerns that the range of issues identified was too wide and that the scope of the comprehensive reference document might need to be reduced. The Commission eventually agreed to ask its secretariat to prepare a sample portion of the comprehensive reference document dealing specifically with issues related to authentication and cross-border recognition of electronic signatures, for review at its fortieth session, in 2007.[26]

331. The sample chapter that the Secretariat prepared pursuant to that request (A/CN.9/630 and Add.1-5) was submitted to the Commission at its fortieth session. The Commission commended the Secretariat for the preparation of the sample chapter and requested the Secretariat to publish it as a stand-alone publication. Although the Commission was not in favour of requesting the Secretariat to undertake a similar work in other areas with a view to preparing a comprehensive reference document, the Commission agreed to request the Secretariat to continue to follow legal developments in the relevant areas closely, with a view to making appropriate suggestions in due course.[27]

332. The Secretariat has continued to follow technological developments and new business models in the area of electronic commerce that may have an impact on international trade. One area that the Secretariat has examined closely concerns legal issues arising out of the use of single windows in international trade. The Secretariat had been invited by the World Customs Organization (WCO) and the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT), to consider possible topics of cooperation with those organizations in that area.

333. At the current session, the Commission had before it a note by the Secretariat (A/CN.9/655) setting out policy considerations and legal issues in the implementation and operation of single windows and submitting proposals for possible future work in cooperation with other international organizations. The note also summarized the proposal by WCO for joint work (ibid., paras. 35-39).

334. The Commission was informed that single windows could enhance the availability and handling of information, expedite and simplify information flows between traders and Governments and result in a greater harmonization and sharing of the relevant data across governmental systems, bringing meaningful gains to all parties involved in cross-border trade. The Commission noted that the use of single windows could result in improved efficiency and effectiveness of official controls and could reduce costs for both Governments and traders as a result of better use of resources. At the same time, the Commission also noted that the implementation and operation of single windows gave rise to a number of legal issues including, for example, the legislative authority to operate single windows; identification, authentication and authorization to exchange documents and messages through

[26] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 216.
[27] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 195.

single windows; data protection; liability of operators of single windows; and legal validity of documents exchanged in electronic form.

335. The Commission also heard a proposal for the Commission to undertake a project to identify the basic issues and define the fundamental principles that must be addressed to develop workable international legal systems for electronic transferable records and to assist States in developing domestic systems that affect international commerce. Such work, it was proposed, would likely focus to some extent on the use of electronic registries, but should recognize that specific solutions would vary based on sector and application requirements. The proposed project would include a clear set of high-level principles that could be incorporated into any international system for transferable records. It was suggested that additional guidance could be provided to assist States, international organizations and industries to assess the legal risks and the options available to them and to help them through the process of crafting approaches to transferability best suited to their needs and the needs of global commerce. If appropriate, following that phase, consideration could then be given to the possible need for and feasibility of elaborating additional instruments that could promote commerce and trade by boosting the effectiveness of electronic records.

336. The Commission agreed that it would be worthwhile to study the legal aspects involved in implementing a cross-border single window facility with a view to formulating a comprehensive international reference document to which legislators, Government policymakers, single window operators and other stakeholders could refer for advice on legal aspects of creating and managing a single window designed to handle cross-border transactions. The Commission's involvement in such a project in cooperation with WCO and other organizations would have several benefits, including: (a) better coordination of work between the Commission, WCO and UN/CEFACT; (b) being able to influence the content of a trade-facilitation text that may contain significant legislative aspects; and (c) promoting the use of UNCITRAL standards in the countries using the future reference document.

337. The Commission also agreed that it would be worthwhile for the Secretariat to keep under examination legal issues related to electronic equivalents to negotiable documents and other electronic systems for the negotiation and transfer of rights in goods, securities and other rights in electronic form. It was also stated that such work might reveal elements of commonality between single windows and electronic equivalents to negotiable documents. The Commission was cautioned, however, that at present the project was not ripe for an intergovernmental working group as it had not yet been determined whether there was a need for any additional legislative work on the issues of negotiability in an electronic environment. It was also suggested that the organization of a colloquium by the Secretariat might help to identify specific areas in which the Commission might usefully undertake work in the future.

338. The Commission requested the Secretariat, at an initial stage, to engage actively, in cooperation with WCO and with the involvement of experts, in respect of the single window project and to report to the Commission on the progress of that work at its next session. The Commission agreed to authorize holding a Working Group session in the spring of 2009, after full consultation with States, should this be warranted by the progress of work done in cooperation with WCO.

IX. Possible future work in the area of commercial fraud

A. Work on indicators of commercial fraud

339. It was recalled that the Commission at its thirty-fifth to fortieth sessions, from 2002 to 2007, had considered possible future work on commercial fraud.[28] It was in particular recalled that at its thirty-seventh session, in 2004, with a view towards education, training and prevention, the Commission had agreed that the preparation of lists of common features present in typical fraudulent schemes could be useful as educational material for participants in international trade and other potential targets of perpetrators of fraud to the extent that such lists would help potential targets protect themselves and avoid becoming victims of fraudulent schemes. While it was not proposed that the Commission itself or its intergovernmental working groups should be directly involved in that activity, it was agreed that the Secretariat should consider preparing, in close consultation with experts, such materials listing common features present in typical fraudulent schemes and that the Secretariat would keep the Commission informed of progress in that regard.[29]

340. At its fortieth session (Vienna, 25 June-12 July and 10-14 December 2007) the Commission was informed that the Secretariat had, as requested, continued its work in conjunction with experts and other interested organizations with respect to identifying common features of fraudulent schemes in order to prepare materials of an educational nature for the purpose of preventing the success of fraudulent schemes. The results of that work were reflected in a note by the Secretariat entitled "Indicators of commercial fraud" (A/CN.9/624 and Add.1 and 2). The Commission at that session commended the Secretariat, the experts and other interested organizations that had collaborated on the preparation of the indicators of commercial fraud for their work on the difficult task of identifying the issues and in drafting materials that could be of great educational and preventive benefit. At its fortieth session, the Commission requested the Secretariat to circulate the materials on indicators of commercial fraud for comment prior to the forty-first session of the Commission.[30]

341. By a note verbale dated 8 August 2007 and a letter dated 20 September 2007, the draft text of the indicators of commercial fraud was circulated for comment to States and to intergovernmental and international non-governmental organizations that were invited to attend the meetings of the Commission and its working groups as observers.

342. At its current session, the Commission had before it the comments of States and organizations on the indicators of commercial fraud submitted to the Secretariat (A/CN.9/659 and Add.1 and 2) and the text of the indicators that had been circulated

---

[28] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 279-290; ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 231-241; ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 108-112; ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 216-220; ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), paras. 211-217; and ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 196-203.

[29] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 112.

[30] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 200.

(A/CN.9/624 and Add.1 and 2). Following its consideration of the comments of Governments and international organizations, the Commission reiterated its support for the preparation and dissemination of the indicators of commercial fraud, which were said to represent an extremely useful approach to a difficult problem. The indicators, it was said, would be an important and credible addition to the arsenal of weapons available in the battle against fraudulent practices, which were so detrimental to the commercial world.

343. The Commission considered how best to proceed with respect to completing the work on the indicators of commercial fraud. Given the technical nature of the comments received and bearing in mind that such treatment should keep separate any criminal law aspects of commercial fraud, the Secretariat was requested to make such adjustments and additions as were advisable to improve the materials and then to publish the materials as a Secretariat informational note for educational purposes and fraud prevention. The Commission was of the view that the materials could be incorporated by the Secretariat as a component of its broader technical assistance work, which could include dissemination and explanation to Governments and international organizations intended to enhance the educational and preventive advantages of the materials. Further, Governments and international organizations could be encouraged in turn to publicize the materials and make use of them in whatever manner was appropriate, including tailoring them to meet the needs of various audiences or industries.

344. In terms of additional future work in the area of commercial fraud, one possible topic that was suggested was the creation of recommendations regarding fraud prevention. The Commission agreed that the publication of the indicators on commercial fraud and their incorporation into technical assistance work were very useful steps to be taken in the fight against such fraudulent schemes, leaving open the question of future work in the area to be considered by the Secretariat, which could make appropriate recommendations to the Commission.

B. Collaboration with the United Nations Office on Drugs and Crime with respect to commercial and economic fraud

345. At its thirty-eighth session, in 2005, the Commission's attention was drawn to Economic and Social Council resolution 2004/26 of 21 July 2004, pursuant to which an intergovernmental expert group would prepare a study on fraud and the criminal misuse and falsification of identity and develop on the basis of such a study relevant practices, guidelines or other materials, taking into account in particular the relevant work of UNCITRAL. The resolution also recommended that the United Nations Office on Drugs and Crime (UNODC) serve as secretariat for the intergovernmental expert group, in consultation with the secretariat of UNCITRAL.[31]

346. At its thirty-ninth session, in 2006,[32] and at its fortieth session, in 2007, the Commission had been informed that two meetings of the intergovernmental expert group convened by UNODC had taken place (in March 2005 and January 2007), with participation by the UNCITRAL secretariat, and that the expert group had

[31] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 217.

[32] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), paras. 211-217.

completed its work on the Study on Fraud and the Criminal Misuse and Falsification of Identity (E/CN.15/2007/8 and Add.1-3).[33] The Commission was informed at its fortieth session[34] that the Commission on Crime Prevention and Criminal Justice had considered the study at its sixteenth session (Vienna, 23-27 April 2007)[35] and had proposed a draft resolution for the Economic and Social Council with a number of recommendations, including encouraging the promotion of mutual understanding and cooperation between public- and private-sector entities through initiatives aimed at bringing together various stakeholders and facilitating the exchange of views and information among them and requesting UNODC to facilitate such cooperation in consultation with the UNCITRAL secretariat, pursuant to Council resolution 2004/26.[36] The Council subsequently adopted, as resolution 2007/20 of 26 July 2007, the draft resolution proposed by the Crime Commission.

347. At its current session, the Commission was advised that the UNODC secretariat had continued its work in pursuing various aspects of fraud, including work on identity fraud. In keeping with the request of the Commission at its previous session,[37] the UNCITRAL secretariat had cooperated with UNODC in order to provide appropriate private sector and commercial expertise. The Commission noted that information with interest and requested its secretariat to continue to cooperate with and to assist UNODC in its work with respect to commercial and economic fraud and to report to the Commission regarding any developments in that respect.

X. Fiftieth anniversary of the New York Convention

348. The General Assembly adopted on 6 December 2007 resolution 62/65 in which it recognized the value of arbitration as a method of settling disputes in international commercial relations in a manner that contributed to harmonious commercial relations, stimulated international trade and development and promoted the rule of law at the international and national levels. The Assembly expressed its conviction that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958[38] (the "New York Convention"), strengthened respect for binding commitments, inspired confidence in the rule of law and ensured fair treatment in the resolution of disputes arising over contractual rights and obligations.

349. The General Assembly emphasized the necessity for further national efforts to achieve universal adherence to the Convention (which then had 142 States parties), together with its uniform interpretation and effective implementation. The Assembly expressed its hope that States that were not yet parties to the Convention would soon become parties to it, which would ensure that the legal certainty afforded by the Convention was universally enjoyed, decrease the level of risk and transactional

[33] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 199-203.

[34] Ibid.

[35] See *Official Records of the Economic and Social Council, 2007, Supplement No. 10* (E/2007/30/Rev.1).

[36] Ibid., chap. I, sect. B, draft resolution II.

[37] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 203.

[38] United Nations, *Treaty Series*, vol. 330, No. 4739.

costs associated with doing business and thus promote international trade. In that context, the Assembly welcomed the initiatives being undertaken by various organs and agencies within and outside the United Nations system to organize conferences and other similar events to celebrate the fiftieth anniversary of the Convention and encouraged the use of those events for the promotion of wider adherence to the Convention and greater understanding of its provisions and their uniform interpretation and effective implementation. The Assembly requested the Secretary-General to increase efforts to promote wider adherence to the Convention and its uniform interpretation and effective implementation.

350. At its current session, the Commission was informed that a one-day conference, organized jointly by the United Nations and the International Bar Association, was held in New York on 1 February 2008. More than 600 people from 50 countries participated in the event. Leading arbitration experts from more than 20 different States gave reports on matters such as the history and significance of the Convention, practical perspectives on the enforcement of arbitration agreements and arbitral awards, the interplay between the Convention and other international texts and national legislation on arbitration, the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention, the procedural framework in which the New York Convention operated and opportunities and challenges for the future. The New York Convention was praised as one of the most important and successful United Nations treaties in the area of international trade law and as a landmark instrument for the legal effectiveness of international arbitration. Interventions underlined the importance of pursuing efforts to promote the Convention and to disseminate information on its interpretation, including by organizing judicial colloquiums.

351. The Commission was also informed that a conference to celebrate the anniversary of the New York Convention had been organized on 13 and 14 March 2008 in Vienna under the auspices of UNCITRAL and the International Arbitral Centre of the Austrian Federal Economic Chamber. Furthermore, part of the conference held by the International Council for Commercial Arbitration (Dublin, 8-10 June 2008) had been dedicated to celebrating and discussing the Convention. Other conferences dedicated to the Convention were being planned in Kuala Lumpur and Cairo.

352. The Commission expressed its appreciation to the organizers of the conferences and requested the Secretariat to continue monitoring such events and encouraged it to participate actively in initiatives for the promotion of the New York Convention. In that respect, the Commission also noted the importance of the project on monitoring the legislative implementation of the Convention (see paras. 353-360 below) as one that would assist States in ensuring the proper legislative implementation of the Convention and provide welcome advice to States considering becoming party to the Convention. It was recognized that information gathered in the context of the project on the procedural framework in which the Convention operated would enable the Commission to consider any further action it might take to improve the functioning of the Convention.

XI. Monitoring implementation of the New York Convention

353. The Commission recalled that, at its twenty-eighth session, in 1995, it had approved a project, undertaken jointly with Committee D (now known as the Arbitration Committee) of the International Bar Association, aimed at monitoring the legislative implementation of the New York Convention[39] and at considering procedural mechanisms that States had adopted for the recognition and enforcement of arbitral awards under the New York Convention. A questionnaire had been circulated to States with the purpose of identifying how the New York Convention had been incorporated into national legal systems and how it was interpreted and applied. One of the central issues to be considered under that project was whether States parties had included additional requirements for recognition and enforcement of arbitral awards that were not provided for in the New York Convention. It was also recalled that the Secretariat had presented an interim report to the Commission at its thirty-eighth session, in 2005, which set out the issues raised by the replies received in response to the questionnaire circulated in connection with the project (A/CN.9/585).[40] At its fortieth session, in 2007, the Commission was informed that a written report was intended to be presented at its forty-first session.[41]

354. At its current session, the Commission considered a written report in respect of the project, covering implementation of the New York Convention by States, its interpretation and application, and the requirements and procedures put in place by States for enforcing an award under the New York Convention, based on replies sent by 108 States parties to the New York Convention (A/CN.9/656 and Add.1). The Commission expressed its appreciation to those States parties which had provided replies as well as to the Arbitration Committee of the International Bar Association for its assistance to the Secretariat in gathering the information required to prepare the report.

355. The Commission welcomed the recommendations and conclusions contained in the report, noting that they highlighted areas where additional work might need to be undertaken to enhance uniform interpretation and effective implementation of the New York Convention. It was noted that the application of national rules of procedure to matters on which the New York Convention was silent had given rise to diverging solutions to the many different procedural requirements that governed the recognition and enforcement of awards under the Convention, including on questions such as the requirements applicable to a request for enforcement, the correction of defects in applications, the time period for applying for recognition and enforcement of an award, and the procedures and competent courts for recourse against a decision granting or refusing enforcement of an award under the Convention. The Commission agreed that work should be undertaken to eliminate or limit the effect of legal disharmony in that field. The Commission was generally of the view that the outcome of the project should consist in the development of a guide to enactment of the New York Convention, with a view to promoting a uniform interpretation and application of the Convention, thus avoiding uncertainty resulting from its imperfect or partial implementation and limiting the risk that

[39] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* (A/50/17), paras. 401-404.

[40] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 188-191.

[41] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 207.

practices of States diverge from the spirit of the Convention. The Commission requested the Secretariat to study the feasibility of preparing such a guide.

356. The Commission considered whether the replies to the questionnaire sent by States in the context of the project should be made publicly available by the Secretariat. It was recognized that the information on the procedural framework in which the Convention operated would enable the Commission to consider any further action it might take to improve the functioning of the Convention and would contribute to increasing awareness of its application. It was noted that replies to the questionnaire were provided by a number of States at the beginning of the project and that these were, in certain instances, outdated. After discussion, the Commission requested the Secretariat to publish on the UNCITRAL website the information collected during the project implementation, in the language in which it was received, and urged States to provide the Secretariat with accurate information to ensure that the data published on the UNCITRAL website remained up to date.

357. The Commission recalled that the Commission on Arbitration of the International Chamber of Commerce had created a task force to examine the national rules of procedure for recognition and enforcement of foreign arbitral awards on a country-by-country basis.[42] The Commission expressed its appreciation to the Commission on Arbitration of the International Chamber of Commerce and commended the Secretariat for maintaining close collaboration between the two institutions. It was noted that the cooperation between the Secretariat and the Commission on Arbitration of the International Chamber of Commerce would be helpful to identify information that might need to be updated. In view of the common features identified in the work of the Commission and the International Chamber of Commerce for the promotion of the New York Convention, the Commission expressed the wish that more opportunities for joint activities would be identified in the future. The Secretariat was encouraged to develop new initiatives in that respect.

358. The Commission was informed that conferences were expected to be organized to discuss the outcome of the project on monitoring the implementation of the New York Convention. Conferences were being planned to be organized under the auspices of the International Bar Association and the International Chamber of Commerce. The Secretariat was requested to monitor and seek active participation in such events.

359. The Commission noted that the recommendation adopted by the Commission at its thirty-ninth session, in 2006,[43] regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention had been circulated to States in order to seek comments as to the impact of that recommendation in their jurisdictions. It was noted that States generally supported the recommendation as a means to promote a uniform and flexible interpretation, in different jurisdictions, of the writing requirement for arbitration agreements under article II, paragraph 2, of the New York Convention. The recommendation was considered to be a means to encourage the development of rules favouring the validity of arbitration agreements and, despite its non-binding nature, it was said to be of particular importance in achieving a uniform interpretation of the Convention.

---

[42] Ibid., para. 207.

[43] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), annex II.

States considered that the recommendation might be of assistance to national courts in interpreting the requirement that an arbitration agreement be in writing in a more liberal manner. A large number of delegations considered that the recommendation encouraged enforcement of awards in the greatest number of cases as possible through article VII, paragraph 1, of the New York Convention allowing the application of national provisions that contained more favourable conditions to a party seeking to enforce an award. After discussion, the Commission agreed that any further comments received by the Secretariat from States on the recommendation be made part of the project on monitoring the implementation of the New York Convention.

360. In addition, the Commission agreed that, resources permitting, the activities of the Secretariat in the context of its technical assistance programme could usefully include dissemination of information on the judicial interpretation of the New York Convention, which would usefully complement other activities in support of the Convention.

XII. Technical assistance to law reform

A. Technical cooperation and assistance activities

361. The Commission had before it a note by the Secretariat (A/CN.9/652) describing the technical cooperation and assistance activities undertaken subsequent to the date of the note on that topic submitted to the Commission at its fortieth session, in 2007 (A/CN.9/627). The Commission emphasized the importance of such technical cooperation and expressed its appreciation for the activities undertaken by the Secretariat referred to in document A/CN.9/652, paragraphs 7-27. It was emphasized that legislative technical assistance, in particular to developing countries, was an activity that was not less important than the formulation of uniform rules itself. For that reason, the Secretariat was encouraged to continue to provide such assistance to the broadest extent possible. Regional events that were a source of technical assistance were pointed out as particularly useful.

362. The Commission noted that the continuing ability to participate in technical cooperation and assistance activities in response to specific requests of States was dependent upon the availability of funds to meet associated UNCITRAL costs. The Commission in particular noted that, despite efforts by the Secretariat to solicit new donations, funds available in the UNCITRAL Trust Fund for Symposia were very limited. Accordingly, requests for technical assistance activities had to be very carefully considered and the number of such activities limited. Particular emphasis was being placed on regional activities involving several countries. Beyond the end of 2008, requests for technical cooperation and assistance involving the expenditure of funds for travel or to meet other associated costs would have to be declined unless new donations to the Trust Fund were received or other alternative sources of funds could be found.

363. The Commission reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL Trust Fund for Symposia, if possible in the form of multi-year contributions, or as specific-purpose contributions, in order to facilitate planning and enable the

Secretariat to meet the increasing requests from developing countries and countries with economies in transition for technical assistance and cooperation activities. The Commission expressed its appreciation to Mexico and Singapore for contributing to the Trust Fund since the Commission's fortieth session and to organizations that had contributed to the programme by providing funds or by hosting seminars. The Commission also expressed its appreciation to France and the Republic of Korea, which had funded junior professional officers to work in the Secretariat.

364. The Commission also appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that were members of the Commission. The Commission also expressed its appreciation to Austria for contributing to the Trust Fund for Travel Assistance since the Commission's fortieth session.

B. Technical assistance resources

365. The Commission noted with appreciation the continuing work under the system established for the collection and dissemination of case law on UNCITRAL texts (CLOUT). As at 8 April 2008, 726 issues of compiled case-law abstracts from the CLOUT system had been prepared for publication, dealing with 761 cases relating mainly to the United Nations Sales Convention and the UNCITRAL Model Law on International Commercial Arbitration, but including some cases on the UNCITRAL Model Law on Cross-Border Insolvency.

366. It was widely agreed that the CLOUT system continued to be an important aspect of the overall technical assistance activities undertaken by UNCITRAL and that its broad dissemination in all six official languages of the United Nations promoted the uniform interpretation and application of UNCITRAL texts. The Commission expressed its appreciation to the national correspondents and other contributors for their work in developing the CLOUT system. The Secretariat was encouraged to take initiatives to extend the composition and vitality of the network of contributors to the CLOUT system.

367. The Commission noted that the digest of case law on the United Nations Sales Convention was currently being published and that a quarterly bulletin and an information brochure on the CLOUT system had been developed to facilitate dissemination of information on the system.

368. The Commission also noted developments with respect to the UNCITRAL website (www.uncitral.org), emphasizing its importance as a component of the overall UNCITRAL programme of information and technical assistance activities. The Commission expressed its appreciation for the availability of the website in the six official languages of the United Nations and encouraged the Secretariat to maintain and further upgrade the website in accordance with existing guidelines. It was noted with particular appreciation that, since the holding of the fortieth session of the Commission, the website had received over one million visits.

369. The Commission took note with appreciation of developments regarding the UNCITRAL Law Library and UNCITRAL publications, including the note of the Secretariat containing the bibliography of recent writings related to the work of UNCITRAL (A/CN.9/650).

XIII. Status and promotion of UNCITRAL legal texts

370. The Commission considered the status of the conventions and model laws emanating from its work and the status of the New York Convention, on the basis of a note by the Secretariat (A/CN.9/651) and updated information available on the UNCITRAL website. With respect to model laws and legislative guides elaborated by it, the Commission noted that their use in, and influence on, the legislative work of States and intergovernmental organizations was considerably greater than suggested by the limited information available to the Secretariat and reflected in the note. The Commission noted with appreciation the information on the following legislative actions of jurisdictions received since its fortieth session regarding the following instruments:

(a) United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg):[44] new action by the Dominican Republic (2007) and Kazakhstan (2008); 34 States parties;

(b) United Nations Convention on the Use of Electronic Communications in International Contracts (2005):[45] signatures by Colombia, Honduras, Iran (Islamic Republic of), Montenegro, Panama, the Philippines, the Republic of Korea and Saudi Arabia;

(c) UNCITRAL Model Law on International Commercial Arbitration (1985):[46] legislation based on the Model Law enacted by Armenia (2006) and Slovenia (2008);

(d) UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994):[47] legislation based on the Model Law enacted by Nigeria (2007);

(e) UNCITRAL Model Law on Electronic Commerce (1996):[48] legislation based on the Model Law enacted by Canada, including the territory of Nunavut (2004);

(f) UNCITRAL Model Law on Cross-Border Insolvency (1997):[49] legislation based on the Model Law enacted by Australia (2008) and the Republic of Korea (2006);

(g) UNCITRAL Model Law on International Commercial Conciliation (2002):[50] legislation based on the Model Law enacted by Slovenia (2008).

---

[44] United Nations, *Treaty Series*, vol. 1695, No. 29215.

[45] United Nations publication, Sales No. E.07.V.2.

[46] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17* (A/52/17), annex I.

[47] Ibid., *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

[48] Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I; see also *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with Additional Article 5 bis as Adopted in 1998* (United Nations publication, Sales No. E.99.V.4).

[49] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17* (A/52/17), annex I.

371. The Commission was informed, and noted with appreciation, that Japan had adopted legislation that would enable it to accede to the United Nations Sales Convention and that the instrument of accession would be deposited with the Secretary-General in due course.

372. The Commission heard that the United Nations Convention on the Use of Electronic Communications in International Contracts would be highlighted at the treaty event[51] to be held from 23 to 25 and from 29 to 30 September 2008. States were invited to consider participating in the treaty event by undertaking appropriate treaty actions relating to the Convention. It was recalled that the Convention had closed for signature on 16 January 2008.

XIV. Working methods of UNCITRAL

373. At the first part of its fortieth session (Vienna, 25 June-12 July 2007), the Commission had before it observations and proposals by France on the working methods of the Commission (A/CN.9/635) and engaged in a preliminary exchange of views on those observations and proposals. It was agreed at that session that the issue of working methods would be placed as a specific item on the agenda of the Commission at its resumed fortieth session (Vienna, 10-14 December 2007). In order to facilitate informal consultations among all interested States, the Secretariat was requested to prepare a compilation of procedural rules and practices established by UNCITRAL itself or by the General Assembly in its resolutions regarding the work of the Commission. The Secretariat was also requested to make the necessary arrangements, as resources permitted, for representatives of all interested States to meet on the day prior to the opening of the resumed fortieth session of the Commission and, if possible, during the resumed session.[52]

374. At its resumed fortieth session, the Commission considered the issue of the working methods of the Commission on the basis of observations and proposals by France (A/CN.9/635), observations by the United States (A/CN.9/639) and the requested note by the Secretariat on the rules of procedure and methods of work of the Commission (A/CN.9/638 and Add.1-6). The Commission was informed about the informal consultations held on 7 December 2007 among representatives of all interested States on the rules of procedure and methods of work of the Commission. At that session, the Commission agreed that any future review should be based on the previous deliberations on the subject in the Commission, the observations by France and the United States (A/CN.9/635 and A/CN.9/639) and the note by the Secretariat (A/CN.9/638 and Add.1-6), which was considered as providing a particularly important historical overview of the establishment and evolution of the UNCITRAL rules of procedure and methods of work. The Commission also agreed that the Secretariat should be entrusted with the preparation of a working document describing current practices of the Commission based on the application of its rules

[50] United Nations publication, Sales No. E.05.V.4.

[51] The treaty event is a yearly exercise aimed at promoting the international rule of law through broader participation in multilateral treaties deposited with the Secretary-General. It usually takes place at United Nations Headquarters during the general debate of the General Assembly

[52] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 234-241.

of procedure and methods of work, in particular as regards decision-making and participation of non-State entities in the work of UNCITRAL, distilling the relevant information from its previous note (A/CN.9/638 and Add.1-6). That working document would be used for future deliberations on the subject in the Commission in formal and informal settings. It was understood that, where appropriate, the Secretariat should indicate its observations on the rules of procedure and methods of work for consideration by the Commission. The Commission further agreed that the Secretariat should circulate the working document to all States for comment and subsequently compile any comments it might receive, that informal consultations among all interested States might be held, if possible, before the forty-first session of the Commission and that the working document might be discussed at the Commission's forty-first session, time permitting.[53]

375. At its current session, the Commission had before it a note by the Secretariat describing current practices of the Commission as regards decision-making, the status of observers in UNCITRAL and the preparatory work undertaken by the Secretariat, and outlining observations by the Secretariat on working methods (A/CN.9/653). That note had been circulated for comments. The Commission also had before it a note by the Secretariat compiling the comments received prior to the current session (A/CN.9/660 and Add.1-4).

376. The Commission expressed particular appreciation for document A/CN.9/653 and generally agreed that the document provided a sound basis for developing a text of a more normative nature. The Commission had a preliminary exchange of views on the three main items discussed in the document, namely, decision-making, the role of observers and the preparatory work undertaken by the Secretariat, as well as on the appropriateness of convening a working group on working methods.

377. With respect to decision-making, there was general agreement that consensus should remain the preferred method. As to the exact meaning of "consensus", the Commission took note of the view expressed at its fortieth session that it should exercise utmost caution in entering areas such as the possible definition of consensus, where its decisions might have an impact on the work of other bodies of the General Assembly.[54] At its current session, there was broad support in the Commission to avoid entering into efforts to arrive at a definition of "consensus". However, general support was expressed for clarifying the manner in which consensus operated in practice. Support was also expressed for clarifying that voting as a right of member States under the Charter of the United Nations was fully recognized by the Commission. On those two points, the Commission agreed with the substance of the explanations provided in paragraphs 9 to 11 and 13 to 18 of the note by the Secretariat (A/CN.9/653).

378. As to the role of observers, the Commission was generally of the view that its approach should continue to be based on flexibility and inclusiveness. The broad openness of the Commission and its subsidiary bodies to observers from State and non-State entities was widely recognized as a key element in maintaining the high quality and the practical relevance of the work of the Commission. The participation of observers in the deliberations of the Commission (including through their election as members of the Bureau of the Commission or a working group in a

[53] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part II, paras. 101-107.

[54] Ibid., para. 104.

personal capacity, as appropriate) and the possibility for them to circulate documents (subject to the authority of the presiding officer as mentioned in para. 47 of the note by the Secretariat) were generally welcomed. As to decision-making, it was widely felt that only States members of the Commission should be called upon to vote. When no formal voting was involved, the Commission noted that under existing practice States not members of the Commission would typically participate in the formation of a consensus, although some delegations were of the view that only States members of the Commission should be considered for the purposes of establishing a consensus. The current practice, which was generally regarded as having led to good results in the past, was found to be consistent with the Commission's aspiration to achieve universal acceptability of its standards. However, it was noted that a number of theoretical problems might result from that practice and that the issue might need to be further discussed at a future session. Regarding the possible distinction to be drawn between different categories of non-governmental entities depending upon their working relationships with the Commission, the Commission welcomed the proposals contained in paragraphs 29 to 36 of the note by the Secretariat and decided that more detailed consideration should be given to those issues at a later stage. There was agreement that non-State entities should not participate in decision-making.

379. With respect to the working methods of the Secretariat, the Commission expressed its general satisfaction with the substance of paragraphs 53 to 61 of the note by the Secretariat (A/CN.9/653). Transparency was recognized as a desirable objective. It was generally agreed that it was particularly important for the Secretariat to preserve the flexibility necessary to organize its work efficiently, including through recourse to external expertise. A widely held view was that efforts should be made, within existing resources, to increase the availability of working drafts and other preparatory materials used by the Secretariat in the two working languages and possibly in other official languages. Along the same lines, it was stated that every effort should be made to provide simultaneous interpretation at expert group meetings convened by the Secretariat.

380. With respect to the question of further work, a proposal was made to establish a working group. There was support for holding informal consultations instead. It was agreed that a meeting of such an informal group would take place in connection with the next session of the Commission.

381. After discussion, the Commission requested the Secretariat to prepare a first draft of a reference document, based on the note by the Secretariat (A/CN.9/653), for use by chairpersons, delegates and observers and by the Secretariat itself. It was understood that the reference document should be somewhat more normative in nature than document A/CN.9/653. While the term "guidelines" was most often used to describe the future reference document, no decision was made as to its final form. The Secretariat was requested to circulate the draft reference document for comments by States and interested international organizations and to prepare a compilation of those comments for consideration by the Commission at its forty-second session. Without prejudice to other forms of consultation, the Commission decided that two days should be set aside for informal meetings to take place, with interpretation in the six official languages of the United Nations, at the beginning of the forty-second session of the Commission to discuss the draft reference document.

(For the decision on the dates of the forty-second session of the Commission, see para. 395 below.)

XV. Coordination and cooperation

382. The Commission had before it a note by the Secretariat (A/CN.9/657 and Add.1 and 2) providing a brief survey of the work of international organizations related to the harmonization of international trade law, focusing upon substantive legislative work. The Commission commended the Secretariat for the preparation of the document, recognizing its value to coordination of the activities of international organizations in the field of international trade law, and welcomed the announced change from publication of the survey on an annual basis to the anticipated future publication of more numerous instalments of the survey as issues arose throughout the year.

383. It was recalled that the Commission at its thirty-seventh session, in 2004, had agreed that it should adopt a more proactive attitude, through its secretariat, to fulfilling its coordination role. [55] Recalling the endorsement by the General Assembly, most recently in its resolution 62/64 of 6 December 2007, paragraph 4, of UNCITRAL efforts and initiatives towards coordination of activities of international organizations in the field of international trade law, the Commission noted with appreciation that the Secretariat was taking steps to engage in a dialogue, on both legislative and technical assistance activities, with a number of organizations, including the Hague Conference on Private International Law, the Organization for Economic Cooperation and Development, the Organization of American States, the International Institute for the Unification of Private Law (Unidroit), the World Bank and the World Trade Organization. The Commission noted that that work often involved travel to meetings of those organizations and the expenditure of funds allocated for official travel. The Commission reiterated the importance of coordination work being undertaken by UNCITRAL as the core legal body in the United Nations system in the field of international trade law and supported the use of travel funds for that purpose.

384. By way of example of current efforts at coordination, the Commission was advised of coordination meetings having taken place in September 2007 in Rome and in May 2008 in New York among the secretariats of the Hague Conference on Private International Law, Unidroit and UNCITRAL. The main topic discussed at those meetings was the interrelationship among the texts on security interests prepared by the Hague Conference on Private International Law, Unidroit and UNCITRAL respectively, and ways in which States could adopt those texts to establish a modern comprehensive and consistent legislative regime on secured transactions. In particular, the Commission was advised that it was recognized that policymakers in States might have difficulty determining how the various instruments adopted by the three organizations in the field of security interests fit together, which ones would best serve the policy goals of the State and whether implementing one instrument would preclude the implementation of another. The Commission was advised that the three organizations were, therefore, preparing a paper aimed at assisting policymakers by summarizing the scope and application of

[55] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 113-115.

those instruments, showing how they worked together and providing a comparative understanding of the coverage and basic themes of each instrument. It was suggested that the paper could be published as one of the future instalments of the ongoing survey of the work of international organizations related to the harmonization of international trade law. There were strong expressions of support in the Commission for those efforts.

XVI. Role of UNCITRAL in promoting the rule of law at the national and international levels

385. The Commission recalled General Assembly resolutions 61/39 of 4 December 2006 and 62/70 of 6 December 2007, both dealing with the rule of law at the national and international levels. The Commission was informed that pursuant to Assembly resolution 62/70, an inventory of activities devoted to the promotion of the rule of law at the national and international levels would be submitted to the Assembly at its sixty-third session, along with an inventory of activities of other organs and offices within the United Nations system devoted to the promotion of the rule of law at the national and international levels.[56] Furthermore, the Commission noted that the Assembly had requested the Secretary-General to submit, at its sixty-third session, a report identifying ways and means for strengthening and coordinating the activities listed in the inventory, with special regard to the effectiveness of assistance that might be requested by States in building capacity for the promotion of the rule of law at the national and international levels.[57] In addition, the Commission noted with appreciation the invitation of the Assembly addressed to the Commission (and the International Court of Justice and the International Law Commission) to comment, in their respective reports to the General Assembly, on their current roles in promoting the rule of law.[58] (For further consideration of relevant General Assembly resolutions, see below, paras. 388 and 389.)

386. The Commission welcomed and expressed its full support for the initiative of the General Assembly regarding the strengthening of the rule of law. The Commission expressed its conviction that the implementation and effective use of modern private law standards on international trade in a manner that was acceptable to States with different legal, social and economic systems were essential in advancing good governance, sustained economic development and the eradication of poverty and hunger. The work of the Commission was thus indispensable in promoting the well-being of all peoples and peaceful coexistence and cooperation among States. The Commission therefore expressed its conviction that promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the Assembly and the Secretary-General to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group, supported by the rule of law unit in the Executive Office of the Secretary-General. The Commission was looking forward to being part of strengthened and coordinated activities of the Organization and saw its role in

[56] Resolution 62/70, para. 1.
[57] Ibid., para. 2.
[58] Ibid., para. 3.

particular as providing assistance to States that sought to promote the rule of law in the area of international and domestic trade and investment.

XVII. Willem C. Vis International Commercial Arbitration Moot competition

387. It was noted that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Fifteenth Moot in Vienna from 14 to 20 March 2008. As in previous years, the Moot had been co-sponsored by the Commission. It was noted that legal issues dealt with by the teams of students participating in the Fifteenth Moot had been based on the United Nations Sales Convention,[59] the Judicial Arbitration and Media Services JAMS International Arbitration Rules,[60] the Arbitration Model Law[61] and the New York Convention.[62] A total of 203 teams from law schools in 52 countries had participated in the Fifteenth Moot. The best team in oral arguments was that of Carlos III University of Madrid. The Sixteenth Willem C. Vis International Commercial Arbitration Moot would be held in Vienna from 2 to 9 April 2009.

XVIII. Relevant General Assembly resolutions

388. The Commission took note with appreciation of General Assembly resolution 62/64 on the report of the Commission on the work of its fortieth session. The Commission noted in particular the appreciation expressed to the Commission by the Assembly for its work on the draft UNCITRAL Legislative Guide on Secured Transactions, for the progress achieved in the ongoing projects of the Commission, for the discussion by the Commission of its working methods and for the holding of the Congress "Modern Law for Global Commerce" in Vienna from 9 to 12 July 2007. The Commission also took note with appreciation of Assembly resolution 62/65 of 6 December 2007 on the Fiftieth anniversary of the New York Convention, and welcomed the emphasis placed on the need to promote wider adherence to the Convention and greater understanding of its provisions and their uniform interpretation and effective implementation.

389. The Commission was apprised of the pertinent statements made by the Vice-Chairperson of the Commission at its fortieth session, Kathryn Sabo, when she presented the annual report of the Commission to the Sixth Committee of the General Assembly on 22 October 2007 and at the conclusion of the Committee's consideration of the item on 23 October 2007. The Vice-Chairperson in her opening statement welcomed the consideration in a comprehensive and coherent manner by the Assembly of ways and means to promote the rule of law at the national and international levels. She noted current sporadic and fragmented approaches within the United Nations in that regard. With the primary focus on criminal justice, transitional justice and judicial reform, these approaches, she stated, often

[59] United Nations, *Treaty Series*, vol. 1489, No. 25567.

[60] Available on the website of JAMS (http://www.jamsadr.com).

[61] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I.

[62] United Nations, *Treaty Series*, vol. 330, No. 4739.

overlooked the economic dimension of the rule of law, including the need for commercial law reforms as an essential foundation for long-term stability, development, empowerment and good governance. She further stated that, as United Nations experience in various areas of its operation had shown, approaches to building and promoting the rule of law had to be comprehensive and coherent in order to achieve sustained results. (For the discussion of the role of the Commission in promoting the rule of law at the national and international levels, see paras. 385 and 386 above.)

XIX. Other business

A. Internship programme

390. An oral report was presented on the internship programme at the UNCITRAL secretariat. Although general appreciation was expressed for the programme, which is designed to give young lawyers the opportunity to become familiar with the work of UNCITRAL and to increase their knowledge of specific areas in the field of international trade law, it was observed that only a small proportion of interns were nationals of developing countries. A suggestion was made that consideration should be given to establishing the financial means of supporting wider participation by young lawyers from developing countries. That suggestion was supported.

B. Proposed strategic framework for the period 2010-2011

391. The Commission had before it a document entitled "Proposed strategic framework for the period 2010-2011" (A/63/6 (Prog. 6)) and was invited to review the proposed biennial programme plan for "the progressive harmonization, modernization and unification of the law of international trade" (subprogramme 5 of the Office of Legal Affairs). The Commission noted that the proposed plan had been reviewed by the Committee for Programme and Coordination at its forty-eighth session and would be transmitted to the General Assembly at its sixty-third session. While the Commission noted with satisfaction that the objectives and expected accomplishments of the Secretariat and the overall strategy for subprogramme 5 as reflected in the document were in line with the general policy of the Commission, grave concerns were expressed that the resources allotted to the Secretariat under subprogramme 5 were insufficient for it to meet, in particular, the increased and pressing demand for technical assistance from developing countries and countries whose economies were in transition to meet their urgent need for law reform in the field of commercial law. The Commission urged the Secretary-General to take steps to ensure that the comparatively small amount of additional resources necessary to meet a demand so crucial to development be made promptly available. (For the discussion of the role of the Commission in promoting the rule of law at the national and international levels, see paras. 385 and 386 above.)

C. Evaluation of the role of the Secretariat in facilitating the work of the Commission

392. As indicated to the Commission at its fortieth session,[63] it was recalled that the programme budget for the biennium 2008-2009 listed among the "expected accomplishments of the Secretariat" its contribution to facilitating the work of UNCITRAL. The performance measure of that expected accomplishment was the level of satisfaction of UNCITRAL with the services provided, as evidenced by a rating on a scale ranging from 1 to 5 (5 being the highest rating).[64] The Commission agreed to provide feedback to the Secretariat. It was recalled that a similar question regarding the level of satisfaction of UNCITRAL with the services provided by the Secretariat had been asked at the close of the fortieth session of the Commission. It had elicited replies from 20 delegations, with an average rating of 4.3.

D. Retirement of the Secretary of the Commission

393. The Commission noted that its Secretary, Jernej Sekolec, was to retire on 31 July 2008. Mr. Sekolec had served as a member of the Secretariat since 1982 and as Secretary of the Commission since 2001. It was widely recognized that the time during which Mr. Sekolec had served as Secretary of the Commission had been a most productive one and that the secretariat of the Commission under the leadership of Mr. Sekolec had made an excellent contribution to that work despite the limited resources available to it. The Commission expressed its appreciation to Mr. Sekolec for his outstanding contribution to the process of unification and harmonization of international trade law in general and to UNCITRAL in particular.

394. At its 885th meeting, on 30 June 2008, the Commission adopted the following declaration:

> "*The United Nations Commission on International Trade Law*,
>
> "*Being informed* that Mr. Jernej Sekolec, Secretary, United Nations Commission on International Trade Law (UNCITRAL) and Director, International Trade Law Division, Office of Legal Affairs, having reached the age of retirement, would leave the United Nations Secretariat on 31 July 2008,
>
> "*Expresses* its deep appreciation for his more than 25 years of exemplary United Nations service,
>
> "*Salutes* his major contributions to achieving the goals of UNCITRAL, which the General Assembly has described as the "core legal body within the United Nations system in the field of international law, [with a mandate] to coordinate legal activities in this field in order to avoid duplication of effort and to promote efficiency, consistency, and coherence in the unification and harmonization of international trade law". He has strongly supported the work

---

[63] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 243.

[64] Proposed programme budget for the biennium 2008-2009, Part III, International justice and law, Section 8, Legal affairs (Programme 6 of the biennial programme plan and priorities for the period 2008-2009), Subprogramme 5, Progressive harmonization, modernization and unification of the law of international trade (A/62/6 (Sect. 8), table 8.19 (d)).

of the Commission and has built enduring foundations for our ongoing projects and future endeavours. He has inspired and led the highly productive Commission secretariat. In these and other ways he has strengthened the efforts to achieve world peace,

"*Recognizes* his courage to stand up and speak, as well as to sit down and listen. The Commission has benefited because he has followed the precepts to keep his eyes on the stars and his feet on the ground. He has been a warm friend and a good companion,

"*Requests* that this declaration expressing the Commission's profound thanks be set forth in its report to the General Assembly and thereby be recorded in the permanent history of the United Nations."

XX. Date and place of future meetings

A. Forty-second session of the Commission

395. The Commission approved the holding of its forty-second session in Vienna from 29 June to 17 July 2009. It was noted that the duration of the session might be modified, should a shorter session become advisable in light of the progress of work in Working Group II (Arbitration and Conciliation) and Working Group V (Insolvency Law).

B. Sessions of working groups up to the forty-second session of the Commission

396. At its thirty-sixth session, in 2003, the Commission agreed that: (a) working groups should normally meet for a one-week session twice a year; (b) extra time, if required, could be allocated from the unused entitlement of another working group provided that such arrangement would not result in an increase of the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) if any request by a working group for extra time resulted in an increase in the 12-week allotment, it should be reviewed by the Commission, with proper justification being given by that working group regarding the reasons for which a change in the meeting pattern was needed.[65]

397. The Commission approved the following schedule of meetings for its working groups:

(a) Working Group I (Procurement) would hold its fourteenth session in Vienna from 8 to 12 September 2008 and its fifteenth session in New York from 2 to 6 February 2009;

(b) Working Group II (Arbitration and Conciliation) would hold its forty-ninth session in Vienna from 15 to 19 September 2008 and its fiftieth session in New York from 9 to 13 February 2009;

[65] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 275.

(c) Working Group IV (Electronic Commerce) would be authorized to hold its forty-fifth session in New York from 26 to 29 May 2009, should this be warranted by the progress of work done in cooperation with the World Customs Organization (see para. 338 above); (a four day session is scheduled, since 25 May will be an official holiday in New York.)

(d) Working Group V (Insolvency Law) would hold its thirty-fifth session in Vienna from 17 to 21 November 2008 and its thirty-sixth session in New York from 18 to 22 May 2009;

(e) Working Group VI (Security Interests) would hold its fourteenth session in Vienna from 20 to 24 October 2008 and its fifteenth session in New York from 27 April to 1 May 2009.

C. Sessions of working groups in 2009 after the forty-second session of the Commission

398. The Commission noted that tentative arrangements had been made for working group meetings in 2009 after its forty-second session (the arrangements were subject to the approval of the Commission at its forty-second session):

(a) Working Group I (Procurement) would hold its sixteenth session in Vienna from 7 to 11 September 2009;

(b) Working Group II (Arbitration and Conciliation) would hold its fifty-first session in Vienna from 14 to 18 September 2009;

(c) Working Group IV (Electronic Commerce) would hold its forty-sixth session in Vienna from 28 September to 2 October 2009;

(d) Working Group V (Insolvency Law) would hold its thirty-seventh session in Vienna from 5 to 9 October 2009;

(e) Working Group VI (Security Interests) would hold its sixteenth session in Vienna from 7 to 11 December 2009.

Annex I

Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

The States Parties to this Convention,

Reaffirming their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Convinced that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality, equity and common interest, and to the well-being of all peoples,

Recognizing the significant contribution of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25 August 1924, and its Protocols, and of the United Nations Convention on the Carriage of Goods by Sea, signed in Hamburg on 31 March 1978, to the harmonization of the law governing the carriage of goods by sea,

Mindful of the technological and commercial developments that have taken place since the adoption of those conventions and of the need to consolidate and modernize them,

Noting that shippers and carriers do not have the benefit of a binding universal regime to support the operation of contracts of maritime carriage involving other modes of transport,

Believing that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

Have agreed as follows:

CHAPTER 1. GENERAL PROVISIONS

Article 1. Definitions

For the purposes of this Convention:

1. "Contract of carriage" means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.

2. "Volume contract" means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.

3. "Liner transportation" means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.

4. "Non-liner transportation" means any transportation that is not liner transportation.

5. "Carrier" means a person that enters into a contract of carriage with a shipper.

6. (a) "Performing party" means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

(b) "Performing party" does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.

7. "Maritime performing party" means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

8. "Shipper" means a person that enters into a contract of carriage with a carrier.

9. "Documentary shipper" means a person, other than the shipper, that accepts to be named as "shipper" in the transport document or electronic transport record.

10. "Holder" means:

(a) A person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.

11. "Consignee" means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.

12. "Right of control" of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.

13. "Controlling party" means the person that pursuant to article 51 is entitled to exercise the right of control.

14. "Transport document" means a document issued under a contract of carriage by the carrier that:

(a) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

15. "Negotiable transport document" means a transport document that indicates, by wording such as "to order" or "negotiable" or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being "non-negotiable" or "not negotiable".

16. "Non-negotiable transport document" means a transport document that is not a negotiable transport document.

17. "Electronic communication" means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.

18. "Electronic transport record" means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that:

(a) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

19. "Negotiable electronic transport record" means an electronic transport record:

(a) That indicates, by wording such as "to order", or "negotiable", or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being "non-negotiable" or "not negotiable"; and

(b) The use of which meets the requirements of article 9, paragraph 1.

20. "Non-negotiable electronic transport record" means an electronic transport record that is not a negotiable electronic transport record.

21. The "issuance" of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.

22. The "transfer" of a negotiable electronic transport record means the transfer of exclusive control over the record.

23. "Contract particulars" means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.

24. "Goods" means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.

25. "Ship" means any vessel used to carry goods by sea.

26. "Container" means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

27. "Vehicle" means a road or railroad cargo vehicle.

28. "Freight" means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.

29. "Domicile" means (a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation or central registered office, whichever is applicable, (ii) central administration or (iii) principal place of business, and (b) the habitual residence of a natural person.

30. "Competent court" means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.

Article 2. Interpretation of this Convention

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Article 3. Form requirements

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 19, paragraph 2; 23, paragraphs 1 to 4; 36, subparagraphs 1 (b), (c) and (d); 40, subparagraph 4 (b); 44; 48, paragraph 3; 51, subparagraph 1 (b); 59, paragraph 1; 63; 66; 67, paragraph 2; 75, paragraph 4; and 80, paragraphs 2 and 5, shall be in writing. Electronic communications may be used for these purposes, provided that the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated.

Article 4. Applicability of defences and limits of liability

1. Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of,

damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

(a) The carrier or a maritime performing party;

(b) The master, crew or any other person that performs services on board the ship; or

(c) Employees of the carrier or a maritime performing party.

2. Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees.

CHAPTER 2. SCOPE OF APPLICATION

Article 5. General scope of application

1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

(a) The place of receipt;

(b) The port of loading;

(c) The place of delivery; or

(d) The port of discharge.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

Article 6. Specific exclusions

1. This Convention does not apply to the following contracts in liner transportation:

(a) Charterparties; and

(b) Other contracts for the use of a ship or of any space thereon.

2. This Convention does not apply to contracts of carriage in non-liner transportation except when:

(a) There is no charterparty or other contract between the parties for the use of a ship or of any space thereon; and

(b) A transport document or an electronic transport record is issued.

Article 7. Application to certain parties

Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the

charterparty or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.

CHAPTER 3. ELECTRONIC TRANSPORT RECORDS

Article 8. Use and effect of electronic transport records

Subject to the requirements set out in this Convention:

(a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and

(b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

Article 9. Procedures for use of negotiable electronic transport records

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:

(a) The method for the issuance and the transfer of that record to an intended holder;

(b) An assurance that the negotiable electronic transport record retains its integrity;

(c) The manner in which the holder is able to demonstrate that it is the holder; and

(d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (a)(ii) and (c), the electronic transport record has ceased to have any effect or validity.

2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

Article 10. Replacement of negotiable transport document or negotiable electronic transport record

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:

(a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;

(b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and

(c) The negotiable transport document ceases thereafter to have any effect or validity.

2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:

(a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and

(b) The electronic transport record ceases thereafter to have any effect or validity.

CHAPTER 4. OBLIGATIONS OF THE CARRIER

Article 11. Carriage and delivery of the goods

The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

Article 12. Period of responsibility of the carrier

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.

2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.

(b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.

3. For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:

(a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or

(b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.

Article 13. Specific obligations

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.

2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be

performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

Article 14. Specific obligations applicable to the voyage by sea

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

(a) Make and keep the ship seaworthy;

(b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and

(c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

Article 15. Goods that may become a danger

Notwithstanding articles 11 and 13, the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment.

Article 16. Sacrifice of the goods during the voyage by sea

Notwithstanding articles 11, 13, and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.

CHAPTER 5. LIABILITY OF THE CARRIER FOR LOSS, DAMAGE OR DELAY

Article 17. Basis of liability

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.

2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.

3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

(a) Act of God;

(b) Perils, dangers, and accidents of the sea or other navigable waters;

(c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;

(d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;

(e) Strikes, lockouts, stoppages, or restraints of labour;

(f) Fire on the ship;

(g) Latent defects not discoverable by due diligence;

(h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;

(i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;

(j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;

(l) Saving or attempting to save life at sea;

(m) Reasonable measures to save or attempt to save property at sea;

(n) Reasonable measures to avoid or attempt to avoid damage to the environment; or

(o) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.

4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:

(a) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; or

(b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18.

5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:

(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the

carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods; and

(b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) that it complied with its obligation to exercise due diligence pursuant to article 14.

6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

Article 18. Liability of the carrier for other persons

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

(a) Any performing party;

(b) The master or crew of the ship;

(c) Employees of the carrier or a performing party; or

(d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

Article 19. Liability of maritime performing parties

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

Article 20. Joint and several liability

1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention.

2. Without prejudice to article 61, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention.

Article 21. Delay

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed.

Article 22. Calculation of compensation

1. Subject to article 59, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 43.

2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 16.

Article 23. Notice in case of loss, damage or delay

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods.

2. Failure to provide the notice referred to in this article to the carrier or the performing party shall not affect the right to claim compensation for loss of or damage to the goods under this Convention, nor shall it affect the allocation of the burden of proof set out in article 17.

3. The notice referred to in this article is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the person to which they have been delivered and the carrier or the maritime performing party against which liability is being asserted.

4. No compensation in respect of delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.

5. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.

6. In the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and tallying the goods and shall provide access to records and documents relevant to the carriage of the goods.

CHAPTER 6. ADDITIONAL PROVISIONS RELATING TO PARTICULAR STAGES OF CARRIAGE

Article 24. Deviation

When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 61.

Article 25. Deck cargo on ships

1. Goods may be carried on the deck of a ship only if:

(a) Such carriage is required by law;

(b) They are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles; or

(c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.

2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (a) or (c) of this article.

3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 17.

4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.

5. If the carrier and shipper expressly agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage, or delay resulted from their carriage on deck.

Article 26. Carriage preceding or subsequent to sea carriage

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

CHAPTER 7. OBLIGATIONS OF THE SHIPPER TO THE CARRIER

Article 27. Delivery for carriage

1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.

2. The shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to article 13, paragraph 2.

3. When a container is packed or a vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container or vehicle, and in such a way that they will not cause harm to persons or property.

Article 28. Cooperation of the shipper and the carrier in providing information and instructions

The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.

Article 29. Shipper's obligation to provide information, instructions and documents

1. The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:

(a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and

(b) For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.

2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

Article 30. Basis of shipper's liability to the carrier

1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.

2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 31, paragraph 2, and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34.

3. When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 34.

Article 31. Information for compilation of contract particulars

1. The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 36, paragraph 1; the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any.

2. The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.

Article 32. Special rules on dangerous goods

When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:

(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and

(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.

Article 33. Assumption of shipper's rights and obligations by the documentary shipper

1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 55, and is entitled to the shipper's rights and defences provided by this chapter and by chapter 13.

2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.

Article 34. Liability of the shipper for other persons

The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.

CHAPTER 8. TRANSPORT DOCUMENTS AND ELECTRONIC TRANSPORT RECORDS

Article 35. Issuance of the transport document or the electronic transport record

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option:

(a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or

(b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage or practice of the trade not to use one.

Article 36. Contract particulars

1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:

(a) A description of the goods as appropriate for the transport;

(b) The leading marks necessary for identification of the goods;

(c) The number of packages or pieces, or the quantity of goods; and

(d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include:

(a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;

(b) The name and address of the carrier;

(c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and

(d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.

3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include:

(a) The name and address of the consignee, if named by the shipper;

(b) The name of a ship, if specified in the contract of carriage;

(c) The place of receipt and, if known to the carrier, the place of delivery; and

(d) The port of loading and the port of discharge, if specified in the contract of carriage.

4. For the purposes of this article, the phrase "apparent order and condition of the goods" in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:

(a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and

(b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or electronic transport record.

Article 37. Identity of the carrier

1. If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.

2. If no person is identified in the contract particulars as the carrier as required pursuant to article 36, subparagraph 2 (b), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.

3. Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.

Article 38. Signature

1. A transport document shall be signed by the carrier or a person acting on its behalf.

2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record.

Article 39. Deficiencies in the contract particulars

1. The absence or inaccuracy of one or more of the contract particulars referred to in article 36, paragraphs 1, 2 or 3, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.

2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:

(a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or

(b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.

3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them.

Article 40. Qualifying the information relating to the goods in the contract particulars

1. The carrier shall qualify the information referred to in article 36, paragraph 1, to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if:

(a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is false or misleading; or

(b) The carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading.

2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 36, paragraph 1, in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper.

3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container or vehicle, or when they are delivered in a closed container or vehicle and the carrier or a performing party actually inspects them, the carrier may qualify the information referred to in article 36, paragraph 1, if:

(a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or

(b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.

4. When the goods are delivered for carriage to the carrier or a performing party in a closed container or vehicle, the carrier may qualify the information referred to in:

(a) Article 36, subparagraphs 1 (a), (b), or (c), if:

(i) The goods inside the container or vehicle have not actually been inspected by the carrier or a performing party; and

(ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and

(b) Article 36, subparagraph 1 (d), if:

(i) Neither the carrier nor a performing party weighed the container or vehicle, and the shipper and the carrier had not agreed prior to the shipment that the container or vehicle would be weighed and the weight would be included in the contract particulars; or

(ii) There was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.

Article 41. Evidentiary effect of the contract particulars

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 40:

(a) A transport document or an electronic transport record is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars;

(b) Proof to the contrary by the carrier in respect of any contract particulars shall not be admissible, when such contract particulars are included in:

(i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith; or

(ii) A non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith;

(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any of the following contract

particulars included in a non-negotiable transport document or a non-negotiable electronic transport record:

(i) The contract particulars referred to in article 36, paragraph 1, when such contract particulars are furnished by the carrier;

(ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and

(iii) The contract particulars referred to in article 36, paragraph 2.

Article 42. "Freight prepaid"

If the contract particulars contain the statement "freight prepaid" or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

CHAPTER 9. DELIVERY OF THE GOODS

Article 43. Obligation to accept delivery

When the goods have arrived at their destination, the consignee that demands delivery of the goods under the contract of carriage shall accept delivery of the goods at the time or within the time period and at the location agreed in the contract of carriage or, failing such agreement, at the time and location at which, having regard to the terms of the contract, the customs, usages or practices of the trade and the circumstances of the carriage, delivery could reasonably be expected.

Article 44. Obligation to acknowledge receipt

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

Article 45. Delivery when no negotiable transport document or negotiable electronic transport record is issued

When neither a negotiable transport document nor a negotiable electronic transport record has been issued:

(a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 43. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier;

(b) If the name and address of the consignee are not referred to in the contract particulars, the controlling party shall prior to or upon the arrival of the goods at the place of destination advise the carrier of such name and address;

(c) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the

carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(d) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper pursuant to subparagraph (c) of this article is discharged from its obligations to deliver the goods under the contract of carriage.

Article 46. Delivery when a non-negotiable transport document that requires surrender is issued

When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The carrier shall deliver the goods at the time and location referred to in article 43 to the consignee upon the consignee properly identifying itself on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to properly identify itself on the request of the carrier, and shall refuse delivery if the non-negotiable document is not surrendered. If more than one original of the non-negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity;

(b) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

Article 47. Delivery when a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 43 to the holder:

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a)(i), upon the holder properly identifying itself; or

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;

(b) The carrier shall refuse delivery if the requirements of subparagraph (a)(i) or (a)(ii) of this paragraph are not met;

(c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity. When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, paragraph 1.

2. Without prejudice to article 48, paragraph 1, if the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rules apply:

(a) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (a)(i), or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(b) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (a) of this article is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

(c) The person giving instructions under subparagraph 2 (a) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph 2 (e) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

(d) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph 2 (b) of this article, but pursuant to contractual or other arrangements made before such delivery acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods;

(e) Notwithstanding subparagraphs 2 (b) and 2 (d) of this article, a holder that becomes a holder after such delivery, and that did not have and could not reasonably have had knowledge of such delivery at the time it became a holder, acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

Article 48. Goods remaining undelivered

1. For the purposes of this article, goods shall be deemed to have remained undelivered only if, after their arrival at the place of destination:

(a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 43;

(b) The controlling party, the holder, the shipper or the documentary shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 45, 46 and 47;

(c) The carrier is entitled or required to refuse delivery pursuant to articles 44, 45, 46 and 47;

(d) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested; or

(e) The goods are otherwise undeliverable by the carrier.

2. Without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:

(a) To store the goods at any suitable place;

(b) To unpack the goods if they are packed in containers or vehicles, or to act otherwise in respect of the goods, including by moving them; and

(c) To cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.

3. The carrier may exercise the rights under paragraph 2 of this article only after it has given reasonable notice of the intended action under paragraph 2 of this article to the person stated in the contract particulars as the person, if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.

4. If the goods are sold pursuant to subparagraph 2 (c) of this article, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods.

5. The carrier shall not be liable for loss of or damage to goods that occurs during the time that they remain undelivered pursuant to this article unless the claimant proves that such loss or damage resulted from the failure by the carrier to take steps that would have been reasonable in the circumstances to preserve the goods and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps.

Article 49. Retention of goods

Nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due.

CHAPTER 10. RIGHTS OF THE CONTROLLING PARTY

Article 50. Exercise and extent of right of control

1. The right of control may be exercised only by the controlling party and is limited to:

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

(b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and

(c) The right to replace the consignee by any other person including the controlling party.

2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

Article 51. Identity of the controlling party and transfer of the right of control

1. Except in the cases referred to in paragraphs 2, 3 and 4 of this article:

(a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;

(b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; and

(c) The controlling party shall properly identify itself when it exercises the right of control.

2. When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document by transferring the document to that person without endorsement. If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and

(b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a)(i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party;

(b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

Article 52. Carrier's execution of instructions

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 50 if:

(a) The person giving such instructions is entitled to exercise the right of control;

(b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and

(c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.

2. In any event, the controlling party shall reimburse the carrier for any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently

executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.

3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

4. The carrier's liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 17 to 23, and the amount of the compensation payable by the carrier shall be subject to articles 59 to 61.

Article 53. Deemed delivery

Goods that are delivered pursuant to an instruction in accordance with article 52, paragraph 1, are deemed to be delivered at the place of destination, and the provisions of chapter 9 relating to such delivery apply to such goods.

Article 54. Variations to the contract of carriage

1. The controlling party is the only person that may agree with the carrier to variations to the contract of carriage other than those referred to in article 50, subparagraphs 1 (b) and (c).

2. Variations to the contract of carriage, including those referred to in article 50, subparagraphs 1 (b) and (c), shall be stated in a negotiable transport document or in a non-negotiable transport document that requires surrender, or incorporated in a negotiable electronic transport record, or, upon the request of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record. If so stated or incorporated, such variations shall be signed in accordance with article 38.

Article 55. Providing additional information, instructions or documents to carrier

1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods not yet provided by the shipper and not otherwise reasonably available to the carrier that the carrier may reasonably need to perform its obligations under the contract of carriage.

2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall provide such information, instructions or documents.

Article 56. Variation by agreement

The parties to the contract of carriage may vary the effect of articles 50, subparagraphs 1 (b) and (c), 50, paragraph 2, and 52. The parties may also restrict or exclude the transferability of the right of control referred to in article 51, subparagraph 1 (b).

CHAPTER 11. TRANSFER OF RIGHTS

Article 57. When a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:

(a) Duly endorsed either to such other person or in blank, if an order document; or

(b) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.

2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

Article 58. Liability of holder

1. Without prejudice to article 55, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.

2. A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.

3. For the purposes of paragraphs 1 and 2 of this article, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:

(a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or

(b) It transfers its rights pursuant to article 57.

CHAPTER 12. LIMITS OF LIABILITY

Article 59. Limits of liability

1. Subject to articles 60 and 61, paragraph 1, the carrier's liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

2. When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of

transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.

3. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

Article 60. Limits of liability for loss caused by delay

Subject to article 61, paragraph 2, compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 22 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant to this article and article 59, paragraph 1, may not exceed the limit that would be established pursuant to article 59, paragraph 1, in respect of the total loss of the goods concerned.

Article 61. Loss of the benefit of limitation of liability

1. Neither the carrier nor any of the persons referred to in article 18 is entitled to the benefit of the limitation of liability as provided in article 59, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

2. Neither the carrier nor any of the persons mentioned in article 18 is entitled to the benefit of the limitation of liability as provided in article 60 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.

CHAPTER 13. TIME FOR SUIT

Article 62. Period of time for suit

1. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted after the expiration of a period of two years.

2. The period referred to in paragraph 1 of this article commences on the day on which the carrier has delivered the goods or, in cases in which no goods have been delivered or only part of the goods have been delivered, on the last day on

which the goods should have been delivered. The day on which the period commences is not included in the period.

3. Notwithstanding the expiration of the period set out in paragraph 1 of this article, one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party.

Article 63. Extension of time for suit

The period provided in article 62 shall not be subject to suspension or interruption, but the person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

Article 64. Action for indemnity

An action for indemnity by a person held liable may be instituted after the expiration of the period provided in article 62 if the indemnity action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.

Article 65. Actions against the person identified as the carrier

An action against the bareboat charterer or the person identified as the carrier pursuant to article 37, paragraph 2, may be instituted after the expiration of the period provided in article 62 if the action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that it is the carrier, pursuant to article 37, paragraph 2.

CHAPTER 14. JURISDICTION

Article 66. Actions against the carrier

Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 67 or 72, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:

(a) In a competent court within the jurisdiction of which is situated one of the following places:

(i) The domicile of the carrier;

(ii) The place of receipt agreed in the contract of carriage;

(iii) The place of delivery agreed in the contract of carriage; or

(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or

(b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

Article 67. Choice of court agreements

1. The jurisdiction of a court chosen in accordance with article 66, paragraph (b), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:

(a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and

(b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.

2. A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if:

(a) The court is in one of the places designated in article 66, paragraph (a);

(b) That agreement is contained in the transport document or electronic transport record;

(c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and

(d) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.

Article 68. Actions against the maritime performing party

The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:

(a) The domicile of the maritime performing party; or

(b) The port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods.

Article 69. No additional bases of jurisdiction

Subject to articles 71 and 72, no judicial proceedings under this Convention against the carrier or a maritime performing party may be instituted in a court not designated pursuant to articles 66 or 68.

Article 70. Arrest and provisional or protective measures

Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless:

(a) The requirements of this chapter are fulfilled; or

(b) An international convention that applies in that State so provides.

Article 71. Consolidation and removal of actions

1. Except when there is an exclusive choice of court agreement that is binding pursuant to articles 67 or 72, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, the action may be instituted only in a court designated pursuant to both article 66 and article 68. If there is no such court, such action may be instituted in a court designated pursuant to article 68, subparagraph (b), if there is such a court.

2. Except when there is an exclusive choice of court agreement that is binding pursuant to articles 67 or 72, a carrier or a maritime performing party that institutes an action seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum pursuant to article 66 or 68 shall, at the request of the defendant, withdraw that action once the defendant has chosen a court designated pursuant to article 66 or 68, whichever is applicable, where the action may be recommenced.

Article 72. Agreement after a dispute has arisen and jurisdiction when the defendant has entered an appearance

1. After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.

2. A competent court before which a defendant appears, without contesting jurisdiction in accordance with the rules of that court, has jurisdiction.

Article 73. Recognition and enforcement

1. A decision made in one Contracting State by a court having jurisdiction under this Convention shall be recognized and enforced in another Contracting State in accordance with the law of such latter Contracting State when both States have made a declaration in accordance with article 74.

2. A court may refuse recognition and enforcement based on the grounds for the refusal of recognition and enforcement available pursuant to its law.

3. This chapter shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention, as concerns the recognition or enforcement of judgements as between member States of the regional economic integration organization, whether adopted before or after this Convention.

Article 74. Application of chapter 14

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

CHAPTER 15. ARBITRATION

Article 75. Arbitration agreements

1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:

(a) Any place designated for that purpose in the arbitration agreement; or

(b) Any other place situated in a State where any of the following places is located:

(i) The domicile of the carrier;

(ii) The place of receipt agreed in the contract of carriage;

(iii) The place of delivery agreed in the contract of carriage; or

(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if the agreement is contained in a volume contract that clearly states the names and addresses of the parties and either:

(a) Is individually negotiated; or

(b) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.

4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

(a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article;

(b) The agreement is contained in the transport document or electronic transport record;

(c) The person to be bound is given timely and adequate notice of the place of arbitration; and

(d) Applicable law permits that person to be bound by the arbitration agreement.

5. The provisions of paragraphs 1, 2, 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.

Article 76. Arbitration agreement in non-liner transportation

1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the provisions of this Convention apply by reason of:

(a) The application of article 7; or

(b) The parties' voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention.

2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:

(a) Identifies the parties to and the date of the charterparty or other contract excluded from the application of this Convention by reason of the application of article 6; and

(b) Incorporates by specific reference the clause in the charterparty or other contract that contains the terms of the arbitration agreement.

Article 77. Agreement to arbitrate after a dispute has arisen

Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen the parties to the dispute may agree to resolve it by arbitration in any place.

Article 78. Application of chapter 15

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

CHAPTER 16. VALIDITY OF CONTRACTUAL TERMS

Article 79. General provisions

1. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;

(b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or

(c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 18.

2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes, limits or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or

(b) Directly or indirectly excludes, limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.

Article 80. Special rules for volume contracts

1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.

2. A derogation pursuant to paragraph 1 of this article is binding only when:

(a) The volume contract contains a prominent statement that it derogates from this Convention;

(b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;

(c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and

(d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.

3. A carrier's public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.

4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 14, subparagraphs (a) and (b), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in article 61.

5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:

(a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and

(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.

6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

Article 81. Special rules for live animals and certain other goods

Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that such loss or damage or such loss due to delay would probably result; or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and that no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

CHAPTER 17. MATTERS NOT GOVERNED BY THIS CONVENTION

Article 82. International conventions governing the carriage of goods by other modes of transport

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

(a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;

(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;

(c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or

(d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

Article 83. Global limitation of liability

Nothing in this Convention affects the application of any international convention or national law regulating the global limitation of liability of vessel owners.

Article 84. General average

Nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average.

Article 85. Passengers and luggage

This Convention does not apply to a contract of carriage for passengers and their luggage.

Article 86. Damage caused by nuclear incident

No liability arises under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the Additional Protocol of 28 January 1964 and by the Protocols of 16 November 1982 and 12 February 2004, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988 and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, including any amendment to these conventions and any future convention in respect of the liability of the operator of a nuclear installation for damage caused by a nuclear incident; or

(b) Under national law applicable to the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.

CHAPTER 18. FINAL CLAUSES

Article 87. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 88. Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States at [Rotterdam, the Netherlands] from [...] to [...] and thereafter at the Headquarters of the United Nations in New York from [...] to [...].

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 89. Denunciation of other conventions

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; to the Protocol signed on 23 February 1968 to amend the International Convention for the

Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; or to the Protocol to amend the International Convention for the Unification of certain Rules relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979 shall at the same time denounce that Convention and the protocol or protocols thereto to which it is a party by notifying the Government of Belgium to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

2. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978 shall at the same time denounce that Convention by notifying the Secretary-General of the United Nations to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

3. For the purposes of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraphs 1 and 2 of this article that are notified to the depositary after this Convention has entered into force are not effective until such denunciations as may be required on the part of those States in respect of these instruments have become effective. The depositary of this Convention shall consult with the Government of Belgium, as the depositary of the instruments referred to in paragraph 1 of this article, so as to ensure necessary coordination in this respect.

Article 90. Reservations

No reservation is permitted to this Convention.

Article 91. Procedure and effect of declarations

1. The declarations permitted by articles 74 and 78 may be made at any time. The initial declarations permitted by article 92, paragraph 1, and article 93, paragraph 2, shall be made at the time of signature, ratification, acceptance, approval or accession. No other declaration is permitted under this Convention.

2. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

3. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

4. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

5. Any State that makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal of a declaration, or its modification where permitted by this Convention, takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article 92. Effect in domestic territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. When a Contracting State has declared pursuant to this article that this Convention extends to one or more but not all of its territorial units, a place located in a territorial unit to which this Convention does not extend is not considered to be in a Contracting State for the purposes of this Convention.

4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 93. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. When the number of Contracting States is relevant in this Convention, the regional economic integration organization does not count as a Contracting State in addition to its member States which are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.

3. Any reference to a "Contracting State" or "Contracting States" in this Convention applies equally to a regional economic integration organization when the context so requires.

Article 94. Entry into force

1. This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.

2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the

month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State.

Article 95. Revision and amendment

1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Article 96. Denunciation of this Convention

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at [Rotterdam, the Netherlands], this [...] day of [...], [...], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

Appendix

Renumbering of articles of the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

Current number (annex I to the present document)	*Former article number (A/CN.9/645)*
1	1
2	2
3	3
4	4
5	5
6	6
7	7
8	8
9	9
10	10
11	11
12	12
Deleted	13
13	14
14	15
15	16
16	17
17	18
18	19
19	20
20	21
21	22
22	23
23	24
24	25
25	26
26	27
27	28
28	29
29	30
30	31
31	32
32	33
33	34
34	35
Deleted	36
35	37
36	38

Current number (annex I to the present document)	*Former article number (A/CN.9/645)*
37	39
38	40
39	41
40	42
41	43
42	44
43	45
44	46
45	47
46	48
47	49
48	50
49	51
50	52
51	53
52	54
53	55
54	56
55	57
56	58
57	59
58	60
59	61
60	62
61	63
62	64
63	65
64	66
65	67
66	68
67	69
68	70
69	71
70	72
71	73
72	74
73	75
74	76
75	77
76	78
77	79
78	80
79	81
80	82
81	83

Current number (annex I to the present document)	*Former article number (A/CN.9/645)*
82	84
83	85
84	86
85	87
86	88
87	89
88	90
89	91
90	92
91	93
92	94
93	95
94	96
95	97
96	98

Annex II

Letter dated 5 June 2008 from the Minister of Transport of the Netherlands, the Mayor of Rotterdam and the Executive Board of the Port of Rotterdam Authority addressed to the delegates at the forty-first session of the United Nations Commission on International Trade Law[a]

After many years of hard work in Working Group III, during this session of UNCITRAL it is expected that the text of the new convention on maritime transport of goods will be finalized and approved. Most likely, at the end of the session, many of you will breathe a sigh of relief, while hoping that all your efforts will have resulted in a future unification and modernization of maritime law to the benefit of all parties interested in worldwide trade and transport.

The Netherlands and many of its major maritime interests under which the Municipality and Port of Rotterdam have highly appreciated the initiative of UNCITRAL and fully supported the work of all participating delegations over the years. Now that this task will finally be concluded, it would be an honour for the undersigned, The Netherlands Minister of Transport, The Mayor of Rotterdam and the Executive Board of the Port of Rotterdam Authority to invite all of you to come to the port of Rotterdam and to participate in an event for the celebration of the adoption of the Convention. If the General Assembly of the UN would decide so, this event could include a signing ceremony of the new Convention.

A preliminary program could be along the following lines:

- Monday 14 September 2009

Seminar to be held under the auspices of UNCITRAL and CMI with eminent speakers from all over the world on the subjects of the convention.

- Tuesday 15 September 2009

This day could be primarily devoted to port excursions and other practical matters of convenience.

- Wednesday 16 September 2009

A special session of the UN General Assembly could be held during which delegates will have the opportunity to express their policy view on the future of the convention, including the possibility to formally sign the Convention. Afterwards, the UNCITRAL Secretary could address the press.

At present, we are in an advanced stage of negotiations with the owners of the famous s.s. "Rotterdam", a former Holland-America Line passenger steamer, to host the larger part of the event on board of this ship.

We would be very delighted if you would accept our invitation. You may be assured that we will do our utmost to host you during the above three days in view of your hard and laborious work on the convention over the past years.

[a] The letter is transmitted in the form in which it was received (A/CN.9/XLI/CRP.3).

Yours sincerely,

[*Signed*]
Camiel Eurlings
The Minister of Transport, Public Works and Water Management

[*Signed*]
Ivo Opstelten
The Mayor of Rotterdam

[*Signed*]
Hans Smits
The Executive Board of the Port of Rotterdam Authority

Annex III

List of documents before the Commission at its forty-first session

Symbol	*Title or description*
A/CN.9/640	Report of Working Group I (Procurement) on the work of its twelfth session (Vienna, 3-7 September 2007)
A/CN.9/641	Report of the Working Group on Arbitration and Conciliation on the work of its forty-seventh session (Vienna, 10-14 September 2007)
A/CN.9/642	Report of Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007)
A/CN.9/643	Report of Working Group V (Insolvency Law) on the work of its thirty-third session (Vienna, 5-9 November 2007)
A/CN.9/644	Provisional agenda, annotations thereto and scheduling of meetings of the forty-first session
A/CN.9/645	Report of Working Group III (Transport Law) on the work of its twenty-first session (Vienna, 14-25 January 2008)
A/CN.9/646	Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session (New York, 4-8 February 2008)
A/CN.9/647	Report of Working Group V (Insolvency Law) on the work of its thirty-fourth session (New York, 3-7 March 2008)
A/CN.9/648	Report of Working Group I (Procurement) on the work of its thirteenth session (New York, 7-11 April 2008)
A/CN.9/649	Report of Working Group VI (Security Interests) on the work of its thirteenth session (New York, 19-23 May 2008)
A/CN.9/650	Bibliography of recent writings related to the work of UNCITRAL
A/CN.9/651	Note by the Secretariat on status of conventions and model laws
A/CN.9/652	Note by the Secretariat on technical cooperation and assistance
A/CN.9/653	Note by the Secretariat on UNCITRAL rules of procedure and methods of work
A/CN.9/654	Note by the Secretariat on facilitation of cooperation, direct communication and coordination in cross-border insolvency proceedings
A/CN.9/655	Note by the Secretariat on possible future work on electronic commerce: legal issues arising out of the implementation and operation of single windows in international trade
A/CN.9/656 and Add.1	Note by the Secretariat on the report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
A/CN.9/657 and Add.1	Note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law

Symbol	*Title or description*
A/CN.9/657/Add.2	Note by the Secretariat on current activities of international organizations related to the harmonization and unification of public procurement law
A/CN.9/658 and Add.1-14	Draft convention on contracts for the international carriage of goods wholly or partly by sea: compilation of comments by Governments and intergovernmental organizations
A/CN.9/659 and Add.1 and 2	Indicators of Commercial Fraud (A/CN.9/624, A/CN.9/624/Add.1, and A/CN.9/624/Add.2): compilation of comments by Governments and international organizations
A/CN.9/660 and Add.1-5	Note by the Secretariat on UNCITRAL rules of procedure and methods of work: compilation of comments received from Governments
A/CN.9/661 and Add.1-3	Note by the Secretariat on settlement of commercial disputes: recommendation regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention"); compilation of comments received from Governments
A/CN.9/662	Note by the Secretariat on settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules; observations by the Government of Canada
A/63/6 (Prog. 6)	Proposed strategic framework for the period of 2010-2011: part two; biennial programme plan, programme 6, Legal affairs
A/CN.9/XLI/CRP.3	Note by the Secretariat transmitting a letter dated 5 June 2008 from the Minister of Transport of the Netherlands, the Mayor of Rotterdam and the Executive Board of the Port of Rotterdam Authority addressed to the delegates at the forty-first session of the United Nations Commission on International Trade Law